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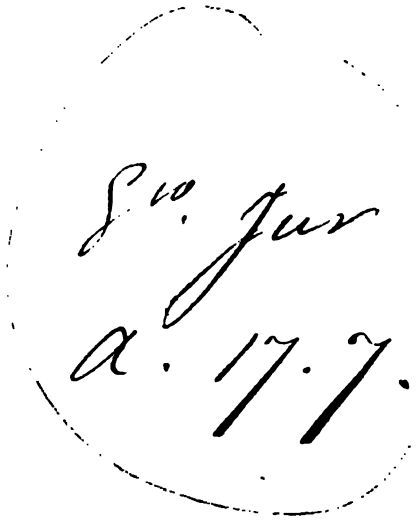

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CASES

IN

CROWN LAW.

THE FOURTH EDITION.

G. WOODFALL, PRINTER,
ANGEL COURT, SKINNER STREET, LONDON.

CASES

IN

CROWN LAW,

DETERMINED BY

THE TWELVE JUDGES;

BY

THE COURT OF KING'S BENCH;

AND BY

COMMISSIONERS OF OYER AND TERMINER, AND GENERAL GAOL DELIVERY;

FROM THE

FOURTH YEAR OF GEORGE THE SECOND, 1730,

TO THE

FIFTY-FIFTH YEAR OF GEORGE THE THIRD, 1815.

BY THOMAS LEACH, ESQ.

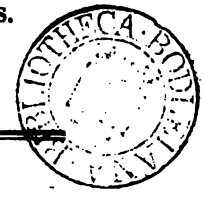
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

THE FOURTH EDITION,

WITH CORRECTIONS AND ADDITIONS.

IN TWO VOLUMES.

VOL. I.



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1815.

TO

SIR WILLIAM GARROW, KNT.

HIS

MAJESTY'S ATTORNEY GENERAL,

AND

CHIEF JUSTICE OF CHESTER,

THE FOLLOWING WORK

IS

(By his Permission)

MOST RESPECTFULLY INSCRIBED,

BY

HIS MOST OBEDIENT,

AND OBLIGED HUMBLE SERVANT,

THE EDITOR.

PREFACE

TO THE

FOURTH EDITION.

THE Manuscript Cases which have been collected by the industry of the Editor, and inserted in the present Edition, reach no further than September Session, 1807: For the remainder of the Cases he is obliged to the kindness of professional friends, whose favours have enabled him to extend the Work, at certain intervals, to the end of the year 1814. He has, however, closely compared all the printed Cases of the former editions with the manuscripts from which they were taken, and has been thereby enabled to make many corrections which had escaped his former researches. The anxieties indeed, which he has always felt, to render this Work as perfect as possible, have been particularly excited upon the present occasion, not only by the very liberal reception it has hitherto met with from the Profession, but particularly by the kind commendations which have been so handsomely bestowed upon it, in the Preface to Mr. EAST's most excellent and authentic Work intitled 'A TREATISE OF THE PLEAS OF THE CROWN.' "If," says the learned author, "my intention had been merely "confined to publish a collection of Crown

" Cases, it is probable that Mr. LEACH's Book " would have made me refrain, from a consi- " deration, since justified by the event, that " whatever inaccuracies first appeared in that " Volume, the principal, at least, would be soon " corrected in the subsequent editions:" an observation so flattering to the feelings of the Editor could not fail of stimulating his industry, and inducing him to make every possible effort in the hope of deserving it. He has, therefore, carefully compared all the Cases in the present Work, with those which have been published by that Gentleman, from the notes and documents of THE JUDGES, with which he was furnished for the purpose of his publication, and has noted the variations at the end of each Case. Besides these Notes, there are inserted in the Work *Seventy-eight* additional Cases, the names of which are mentioned at the end of this sheet, and which, he trusts, will be found not only correctly reported, but professionally important as to the subjects to which they respectively relate. To " The Table of the Names of the Cases" he has added the Subject of each Case; and " The Summary of Contents" has been considerably augmented, and, he hopes, to a certain degree, improved. With these additions and alterations, he again submits the Work to the candour of the Profession, not without great apprehension of censure, and with but little expectation of praise.

PREFACE

TO THE

THIRD EDITION.

THE circumstances which originally induced the Editor to publish the Work, of which this is the third impression, were disclosed in the Preface to the first edition, in which he endeavoured to soften the severity of criticism by a candid and sincere acknowledgment of the many errors and defects he was conscious it contained: Time enabled him, during the interval which elapsed between the publication of the first and the second editions, to remove a few, and certainly only a few, of those errors and defects; and although, since that period, he has not been unmindful of every opportunity that has occurred to improve the Work, he is still conscious that it abounds with imperfections, which he is fearful it will never be in his power entirely to remove: had his own inclination on this subject been quite free and uncontrouled, he might, perhaps, have suffered it to sink into that oblivion in which TIME kindly buries the most unworthy works; but the Proprietor having determined to re-print it "with "all its imperfections on its head," and the un-

expected demand with which, even in this state, it has been favoured, having convinced the Editor that the hope he expressed of " its being " capable of conveying some degree of useful " information," was not entirely unfounded, he has been induced to undertake the superintendance of this edition, and to endeavour, with increased anxiety, to render the present Volumes more worthy of notice: an end which, if it had not been for the very kind, and in some instances, very flattering communications he has received on the subject, he should totally have despaired of attaining.

But whatever may be the case with respect to the merits of the Work, the size of it at least, after expunging many parts of the former impressions, has been considerably increased, 1st, by the alterations which have been made in several of the remaining Cases; 2dly, by a more copious detail of the circumstances under which others were decided; 3dly, by the introduction of some new Cases during the period of the former editions; and 4thly, by the addition of such Cases as the Editor has been able to collect since the publication of the last edition. In reviewing, however, what he has done, he is apprehensive that his labours have only been exerted to increase the occasions of censure, which they were chiefly undertaken to remove.

PREFACE

TO THE

SECOND EDITION.

THE EDITOR, from the information he has received from several PROFESSIONAL FRIENDS, has been enabled to correct some of the Errors of the former Edition, and also to insert, in the present Edition, several Cases never before published. To these emendations he has added all the reserved Cases which have occurred at THE OLD BAILEY since the first Publication of the Work.

PREFACE

TO THE

FIRST EDITION.

IN preparing the Sixth Edition of MR. SERJEANT HAWKINS's Pleas of the Crown for the press, occasional references were made to many of the Cases contained in the following pages; but being made from a collection of MANUSCRIPT NOTES, which, it now appears, is not in very extensive circulation, the Editor is informed, that many endeavours to procure accurate statements of the circumstances on which the Cases were determined, have been attended not only with difficulty, but disappointment; and that unfavourable animadversions have, in consequence, been made on the inexpediency of having cited authorities, to a full and particular detail of which a free access was not immediately to be found. To remove the cause of this complaint, as far at least as is within the Editor's power, was the principal motive to the present publication. But he is seriously apprehensive, that his anxiety for this purpose has led

him to attempt a Work which, from the latent nature of its subject, seems peculiarly to require those opportunities which time and attention can alone afford, before it can possibly be advanced towards maturity or perfection. He flatters himself, however, that the Work, notwithstanding its defects, will be found capable of conveying some degree of useful information; and, he trusts, that the intelligence he may hereafter derive from the friendly communications of the Profession, or from the liberal and candid expositions, whether public or private, of the errors and imperfections which he is conscious the Work contains, will enable him, by correction, to increase its utility, and to render it, at a future period, in some degree deserving of professional approbation.

ERRATA ET ADDENDA.

Page

xxix Instead of " Wain's," read " Waite's" Case.

3 Last line, after " objection" read " S. C. 2 East, 580."

47 Line 20, after " subject" read " See Post. 952."

50 To the case of Rex v. Morris, add " S. C. Bull. N. P. 239, and See Rex v. Benson, Mich. Term 51 Geo. III. 2 Campbel's Rep. 508, where the law of this case is confirmed."

79 To the case of Rex v. Birch and Martin, add " See the indictment. 2 Starkie's Criminal Pleadings, 503."

109 Line 17, after " Rep. 78" read " See also Goodright on demise of Richards v. Williams. 2 Maule and Selwyn's Rep. 270."

143 Line 21, in Marg. add " See Esser's Case. 2 East, P. C. 1125."

200 In Margin, read " Dyer 303. b. in marg."

204 Rex v. Jones, line 3, read " c. 13." instead of " c. 23."

235 Line 27, instead of " substantial" read " substantive."

247 Line 7, instead of " at" read " and."

321 Note (a), line 5, read " this the Judges held, &c."

393 Line 20, instead of " villain," read villien."

422 Last line, read " supposes *the property* still to reside with the owner, though the *manual possession* itself is gone out of his hands, and then the subsequent conversion will be felony; for the *right of possession* still remains with the owner."

424 Line 2, for " reprobated" read " repelled."

493 Add to note (a) " But see Rex v. H. D. Perrott, Hilary Term, 54 Geo. III. 2. Maule and Selwyn's Rep. 379, that the indictment must negative, by special averment, the truth of the pretences."

503 Note (a), line 13, instead of " that" read " whether."

644 Line 11, read " acquire possession of the property."

863 Line 29, read " variance was abandoned."

911 Line 26, instead of " *Rex* v. *Withers*," read " *Rex* v. *Testick*."

913 Note (a), instead of " Keages" read " Headge."

923 Line 24, margin, read " to have been proved."

963 Line 27, instead of " III. c. 13." read " II. c. 13."

967 Line 10, read " 15 Geo. II. c. 13."

976 Line 10, read " 15 Geo. II. c. 13."

970 Line 17, dele " that."

985 Line 14, instead of " prisoner" read " prisoners."

1054 Rex v. Walsh, *passim*, instead of " Sir T. Plomer" read " Sir T. Plumer, Knt."

1096 Line 12, margin, read " 49 Geo. III."

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1 By 28 Hen. VIII. c. 15. all treasons, felonies, robberies, murders and confederacies, committed in or upon THE SEA, or in any haven, river, creek or place, where the admiral has, or pretends to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm, as shall be limited by the King's commission, &c. *Bruce's case* 1093

2 If a loaded pistol be fired from *the land*, at a distance of 100 yards from *the sea*, and a man is maliciously shot in the sea 100 yards from *the shore*, the offender shall be tried in the Admiralty Court, and not at common law, *Coombe's case* 388

3 An accessary to a felonious shipwreck, contrary to the 4 Geo. I. c. 12. and 11 Geo. I. c. 21. is not triable either at Common Law or by the Admiralty, unless he was either the owner or master, or a mariner belonging to the ship, *Pow's case*.....45

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28 Hen. VIII. c. 15. and declaring that it is expedient that *other offences* committed at sea should be tried under that statute, enacts, that *all and every* offence which *after the passing* of the act, shall be committed at sea, shall be offences of the same nature, and liable to the same punishment, as if they had been committed on shore, and shall be tried under 28 Hen. VIII. c. 15. *Bruce's case* 1093

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1 An agent, as for instance a *stock-broker* who receives from his *principal* a draft on a banker which he receives the amount of in bank-notes, for the express purpose of being laid out in the purchase of exchequer bills or other securities, but instead of so doing he only applies part of the property according to the directions of the principal, and fraudulently runs away with the residue, is not thereby guilty of larceny at common law, *Walsh's case* 1054

2 But now by the 52 Geo. III. c. 63. s. 1. if any of the cited securities shall be deposited for safe custody with any banker, merchant, broker, attorney or other AGENT *of any description whatsoever,* and such agent shall violate the trust by converting them, without authority, to his own use, he shall be guilty of a misdemeanor.....1082, *notis.*

3 By 52 Geo. III. c. 63. s. 2. if any such AGENT into whose hands the enumerated instruments shall be placed, with an *order in writing* to invest the same as therein directed, shall in *any manner* apply the same to his own use, contrary to the *special purpose* in such *written order* mentioned, with *intent to* defraud the owner, he *may* be transported for fourteen years .....1082, *text.*

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1 An Agistor, who only takes in sheep to agist for another person, may maintain trespass against any who takes them away, and if *animo furandi,* may indict the trespasser for stealing *his property, Woodward's case* .....357, *notis.*

AIDERS AND ABETTORS.

1 The words, " *abetting* and *commanding* an escape," do not import there was an actual escape; but the words " *aiding* and *assisting* an escape" do, *Tilley's case* 670

2 Aiders and abettors in an illegal act are not answerable for a homicide, unless it be committed in prosecution of such illegal act, *Rex* v. *Hodgson* 6

3 Aiders and abettors are not constructively within the meaning of a statute, which takes away the benefit of clergy from such as shall be *found guilty* of the offence, *Bayne's case* 7

4 Aiders and abettors in feloniously obtaining money by the practice of *ring-dropping,* are principal offenders, *Moor's case*.....314

5 If two persons be indicted for murder, the one as principal in the *first degree,* the other as present aiding and abetting the fact, the Jury may find the person charged in the second degree GUILTY of the fact, and acquit the other, *Taylor and Shaw's case* 360

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1 If the *addition* to a prisoner's name

be placed after the *alias dictus*, and not after *the first name*, the indictment may be quashed, *Major Semple's case* 420

2 But this error is cured by the prisoner's pleading *Not Guilty* to the indictment, and therefore the motion to quash must be before arraignment, *Hannam's case* .....420, *notis.*

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1 By 37 Geo. III. c. 70. to endeavour to seduce any soldier or sailor from his allegiance, or to mutiny, is felony without clergy 790

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2 For any such alteration gives it a new operation, *Masters* v. *Miller*.

3 Or altering the figure 2 in a banknote to 5, making 220*l.* appear 520*l.* *Dawson's case*....1044, *notis.*

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2 And it is now determined, that the 26 Hen. VIII. c. 26. extends to felonies subsequently created, and that an offender in *Brecon* may be tried at *Hereford*, for having forged stamps in his possession at *Llangeny* contrary to 49 Geo. III. c. 80. *Winders's case*.....109, *notis.*

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1 On an indictment against an apprentice for fraudulently inlisting himself as a soldier without the consent of his master, the indentures must be proved by the subscribing witnesses, *Jones' case* 174

2 The Chief Justice of the Court of King's Bench may grant his warrant to bring up the bodies of impressed apprentices, *Apprentices' case*...203

3 Or the apprentice may have a writ of *Habeas Corpus*: but his master cannot, for his remedy is, if his apprentice has been wrongfully impressed, by civil action against the aggressor, *Lansdowne's case*, 201, *notis.*

4 By the mutiny act, if an apprentice inlist in the army, he is punishable with two years hard labour in the House of Correction, and compelled to serve as a soldier on the expiration of his indentures, 174, *notis.*

5 An indictment for stealing the wearing apparel of an *apprentice*, furnished to him in pursuance of the indentures, must lay them to be the property of *the apprentice*, and not of the master. *Forsgates's case*..463

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2 A person cannot be an approver unless he is indicted, and in custody for the offence with which he is charged, and he must confess his guilt, and desire to accuse his accomplices 119

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4 And if it appear that he was the principal instigator in committing the crime for which he is indicted, he may be rejected.....120

5 He must also discover the whole truth; and so nice is the law in this proceeding, that he must without any aid repeat his appeal to the Court, exactly as he had delivered it to the Coroner; and if he fail in the minutest circumstance, as the colour of a horse, or the hour of the day, or the Jury do not convict the accomplice, the whole falls, and he shall be condemned to be hanged; but if he succeeds, he is by right of law intitled to a pardon 120

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3 A person though found, on the trial of the collateral issue, to be mute by the visitation of God, may be arraigned and tried, *E. Steel's* case 452

4 If a person indicted for felony *stand mute* upon his arraignment, the Court may direct the Sheriff to return a Jury *instanter*, to try whether he stand mute obstinately, or by the visitation of God; and if they find that he stand obstinately mute, sentence may be passed without further inquiry, *Mercier's case* 183

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1 The common law definition of ARSON, is the setting fire to and burning the *house of another*. *Pedley's case*.....245

2 By 9 Geo. I. c. 22. to set fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, hay or wood, is ousted of the benefit of clergy, *Taylor's Case* 50

3 The statute 9 Geo. I. c. 22. does not alter the nature of the crime of ARSON, as it stands at common law, or create any new offence; but only excludes *the principal* from his clergy more *clearly* than he was before excluded, *Rex* v. *Spalding* 219

4 The occasion of passing, as to this purpose, the statute 9 Geo. I. c. 22, explained .....219, *notis.*

5 A *drying-loft* annexed or belonging to a *paper-mill*, but not any part of the mill itself, is not an *out-house* within the meaning of this statute, *Taylor's case*.....49

6 A *common gaol*, to which a dwelling-house, for the keeper to reside in, adjoins, is *a house* within the meaning of this statute, if the entrance to the gaol be through the house, although the gaol be separated from the dwelling by a party-wall, *Donavan's case*.....69

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8 A *tenant in possession*, under an agreement for a lease for three years, from a lessee who holds under a building lease, is not guilty of Arson by setting the house on fire, *Rex* v. *Breeme*.....220

9 A tenant from year to year is not guilty of Arson by burning the house of which he is in *possession;*

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10 But if a landlord let a house to parish officers from year to year, and they employ it as the parish poor-house, and the paupers living in it set fire to the house, *he* is thereby guilty of Arson, although he had the sole possession and occupation of it; for it is not *his* house, but the overseers', who possess it by means of the paupers' occupation, *Rex* v. *Gowan*, 246, *notis.*

11 And now, by 43 Geo. III. c. 58. it is a capital offence maliciously to set fire to any house, barn, granary, hop-oast, malt-house, stable, coach-house, out-house, mill, warehouse, or shop, whether in possession of the offender, or of any other person, with intent to injure, &c. .....220, *notis.*

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8 For to constitute a carrying away, the thief must have, for the instant, the entire and absolute possession of the property.....321

ASSENT.

1 The Assent of a prosecutor to give *facility* to the commission of a larceny, for the purpose of detecting the offender, does not do away the felony, although the property was not taken *against his will*, *Eggington's case* 913

2 So even applying to known dealers in forged bank-notes, and procuring them confidentially to sell them at an under price as forged bank-notes, is no objection to a prosecution on the statute 45 Geo. III.

c, 89. s. 2. for disposing of and putting away forged bank-notes, with intent, &c. *Holden's case*, 1019

3 But if a person with a view to the reward for apprehending robbers, agree to suffer himself to be robbed, this is no felony, *Macdaniel's case* 920

ASSIGNATION BOOK.

1 The book kept in the Prerogative Court, called *The Assignation Book*, in which all causes are entered by the Registrar, and which is kept officially by *the Witness*, as the only record of such proceedings, and of the decrees of the Court, is admissible to prove the fact of a probate being revoked, *Ramsbottom's case*, 26, *notis.*

ATTACHMENT.

1 An attachment issued and signed by the County Clerk in his own cause is legal process; and if the officer be resisted and killed in the execution of it, such homicide will be murder, *Baker's case*.....112

ATTAINDER.

1 The attainder of the principal need not be stated in an indictment against the accessary, *Hyman's case*, 927

2 An erroneous attainder against a principal is sufficient as against the accessary, until it be reversed *Baldwin's case*.....928, *notis.*

ATTORNIES.

1 Breaches of trust by attornies punishable by 52 Geo. III. c. 63. 1082

AUTREFOIS ACQUIT.

1 The plea of *autrefois acquit* must be pleaded in *parchment*, *Vandercomb's case* .....708, *notis.*

2 The Jury cannot be charged at the same time, to try the two issues of *autrefois acquit* and *not guilty*; for in all pleas in abatement there are two issues, which are always tried upon separate charges to the Jury, for otherwise, if the first finding was for the prisoner, they could not go to the second issue, as the acquittal on the first would be *a bar*, *Roche's case*.....134

3 As where a person was tried in *Portugal* for murder and acquitted, and afterwards apprehended in *England* for the same fact, and committed to Newgate, and, on *Habeas Corpus*, the Court determined that his former acquittal operated as *a bar* to any further prosecution, *Hutchinson's case*.....135, *notis.*

4 *Autrefois acquit*, therefore, may be pleaded wherever the party has been acquitted before a Court of competent jurisdiction, *ibid.* 135

5 A prisoner acquitted of forgery on a *variance* between the instrument produced in evidence, and that recited in the indictment, cannot effectually plead *autrefois acquit* to another indictment for the same offence, except the instrument be again misrecited in the same manner, *John Coogan's case* 448

6 A plea of *autrefois acquit* must plead over to the felony, *Vandercomb's case* 708

7 A plea of *autrefois acquit* of a burglary, where the felony is laid as *actually* committed, cannot be pleaded to an indictment for the *same burglary* laid *with intent to commit* the felony; for they are two distinct and different offences, *Vandercomb and Abbot's case*, 708

AUTREFOIS CONVICT.

1 *Autrefois convict* may be pleaded by the King in a COUNTERPLEA, to prevent a prisoner who has been before convicted from being a second time allowed the benefit of clergy, *Soott's case*..... 401

2 And in such a plea it is not necessary to set out *the tenor* of the indictment on which the prisoner was *before convicted* and received his clergy; nor can any defects in such indictment be taken advantage of on such plea, for such defects are matter of error, *Scott's case*, 405

3 But the prisoner may plead *nul tiel record*, and deny that he is the person named in the counter-plea, which fact being matter *in pais* shall be tried by a Jury, to be returned *instanter* by the Sheriff, *Scott's case* 404

4 The prisoner, on the trial of such issue, may challenge any of the Jurors before they are sworn, 404

AVERMENT.

1 In an indictment for forging a certain receipt, "*as follows, that is to say*," is a sufficient averment that *the tenor* of the receipt is set out, *Powell's case*.....77

2 In forgery, averring *a general intent to defraud* is sufficient, without setting out the particular mode by which the fraud was intended to be effected, *Robert Powell's case*, 77

3 An indictment for forging a certain paper-writing *purporting* to be a last will, is good, without averring that it is a last will, *Birch and Martin's case*.....79

4 An averment in an indictment for perjury, that the defendant swore to "*the* EFFECT *following*," does not bind to an exact recital, *Beech's case* 133

5 An indictment "*in manner and form following, that is to say*," does not bind the parties to an exact recital, *Hart's case* 145

6 Therefore, in an indictment for perjury, on the trial of an indictment for an assault, in which it was stated that the plaintiff had received an injury, "*whereby his life was greatly despaired of*," and the indictment for the perjury had introduced the indictment for the assault as having been found "*in manner and form following, that is to say*, &c." but omitted to insert the word "*despaired*," it was held that nothing more is necessary than a substantial recital, *May's case*, 192

7 The word TENOR has a strict technical meaning, and makes a *literal* recital necessary, *ibid* 192

8 In an action on a Sheriff's bond, if a plea conclude that the bond was taken "against the form of the statute *aforesaid*," the word "*aforesaid*" binds the party to an exact recital of the statute, *Boyce* v. *Whitaker* .....192, *notis.*

9 The words "*purporting* to be a "bank-note, &c," is an averment that the instrument *upon the face of it* appears to be a bank-note; and the defect of such appearance cannot be supplied by extrinsic evidence, *William Jones's case* ...204

10 And therefore an indictment for forging a bill of exchange, stating that it *purported* to be directed to *John King*, by the name and description of *John Ring*, is bad, *Reading's case*.....590

11 Immaterial averments in an indictment, as if in libel, the libel be not connected with the averment, it need not be proved; but where the averment is connected with the charge, it must be proved, *Holt's case* 594

12 A signature which does not of itself purport to be a receipt, may be so made by proper averments, *Hunter's case* 624

13 As where to a bill of parcels the prisoner forged the word "*settled*," it was held that as this did not on the face of it purport to be *a*

receipt for money, it was necessary to shew that it was such an instrument by proper averments, *Thompson's case*.....911

B.

BAIL.

1 The Court of King's Bench has a discretionary power to bail in all cases whatsoever, *Rudd's case*, 117

2 The Court will not bail a prisoner committed for forgery, especially on the eve of the sessions 117

3 The *ill health* of a prisoner committed for a capital offence, is not of itself a sufficient ground to induce the Court to admit to bail, *Mrs. Rudd's case* 117

4 The Court of King's Bench will not bail *an accomplice* who has been admitted a witness for the Crown, unless such accomplice has made a full, entire, and free disclosure of the guilt of himself and his companions, *Mrs. Rudd's case*, 115

5 For an accomplice, though admitted King's evidence by the magistrate, is not intitled thereby to be bailed *ex debito justitiæ*; but merely acquires an *equitable title* to hope, from the usage, the lenity, and practice of the Court, a recommendation for the King's mercy, to stop the prosecution against him 118

6 A prisoner committed for high treason in North America, who is only triable before the *King's Bench*, or under a *special commission*, cannot be admitted to bail under the *Habeas Corpus Act* by Justices of *Gaol Delivery*, or discharged by their *proclamation* for want of prosecution, *Platt's case*, 157

7 The Court of King's Bench, in admitting prisoners to bail, will look into the depositions, and guide themselves by the circumstances of the case, *Rex* v. *Horner*.....270

8 And therefore if the Court, by inspecting the commitment, see that the prisoner is not charged with *a felony*, they will bail him, *Judd's case*.....484

9 A prisoner committed on the 2 Geo. III. c. 28. for knowingly receiving part of a ship's cargo, is not intitled to be bailed, although the statute do not expressly declare the offence to be felony, *Rex* v. *Wyer*.....480

10 But by 39 & 40 Geo. III. c. 87. s. 22. this offence is now declared to be felony, and the offender compelled to plead without being allowed to traverse .....481, *notis.*

11 If bail admit that "he has stood "in the pillory for perjury," he is not an admissible witness, *Edward's case* .....442, *notis.*

12 A prisoner in custody on a charge of perjury is not dischargeable on the indictment being removed into the King's Bench; but if he had been on bail, such removal would have discharged the recognizance, *Richardson's case*.....560

BANKERS.

1 By the common law if a banker's clerk received notes or money at the counter from a customer, for and on account of his employers, but instead of putting them into the cash till, or note drawer, he put them immediately into his own pocket, this was a *breach of trust*, but not a felonious taking, *Bazeley's case* 835

2 For the property never passed out of the possession of the clerk into the possession of the banker, and no

person can be guilty of stealing that of which he is in the legal possession, *Waite's case* 31

3 The law to constitute larceny requiring that the property taken should be taken from the possession of the party who holds it, and the banker in such case is not the holder of it, *Bull's case* 841

4 But now by 39 Geo. III. c. 85. if any banker's clerk shall in that capacity receive any money, goods, bond, bill, notes, draft, or other valuable security or effects, for and on account of his employer, the possession of such clerk shall be considered the possession of the banker 849

5 This statute therefore makes the embezzling and purloining of property, so received and purloined, a larceny of the same kind as that offence is at common law, *Mc Gregor's case* 932

6 And by 52 Geo. III. c. 63. s. 1. If any of the securities therein mentioned shall be deposited with any banker, merchant, broker, attorney, or other agent of any description, and such banker, &c. shall, without authority, and contrary to the special purpose for which they were deposited, apply them in any way to his own use, he shall be guilty of a misdemeanor .....1082, *notis.*

7 By 52 Geo. III. c. 63. s. 2. if any banker, &c. shall misapply the property therein mentioned, contrary to the *written* directions he shall receive with the same, he *may* be transported for fourteen years 1082

BANK OF ENGLAND.

1 The clerks, cashiers, and other persons employed by the Bank, were, at common law, guilty of a *breach of trust* only, and not of *felony*, by embezzling and purloining the *particular property* of the Bank, entrusted to their care, *Hassell's case*, 1

2 Therefore where a cashier of the Bank received six India Bonds for and on account of THE BANK, in his capacity of cashier, instead of depositing them in the strong chest, of which he was entrusted with the key, locked them up in his own desk, and afterwards converted the produce to his own use, it was held no felony, but a breach of trust; for they never had been in *the possession* of his employers, *Waite's case* 35

3 But now by 15 Geo. II. c. 13. s. 12. it is a capital offence for any officer or servant of the Bank, being intrusted with *any* note, bill, dividend warrant, *bond*, deed, or any security, money, or other effects, belonging to the Bank; or having any such securities lodged or deposited with him, to embezzle the same 32

4 By 33 Geo. III. c. 30. s. 2. to forge any transfer of stock, &c. at the Bank of England, is a capital offence 732

5 An indictment for forging a transfer is good, although the stock had never been *accepted* by the person in whose name it stood, and although the transfer was not *witnessed* according to the rules and directions of the Bank, *Gade's case* 732

6 The 35 Geo. III. c. 66. s. 6. and 37 Geo. III. c. 46. s. 6. for making certain annuities created by the parliament of Ireland, transferable, and the dividends payable at the Bank of England, contain exactly the same provisions, with respect to officers and servants of the Bank, 735

7 If a servant of the Bank contrive to take *a paid bank-note* from the file, and conceal the cancel mark, so as to render it negotiable, and

convert its produce to his own use, this is an embezzlement within the 15 Geo. II. c. 13. for the note though paid, still continues part of the *effects* belonging to the Bank, *Bakewell's case* 943

8 So also exchequer bills purchased by the Bank, although not signed by proper authority, and so void as exchequer bills, are *effects* belonging to the Bank, and the servant embezzling them may be indicted on the 15 Geo. II. c. 12. *Aslett's case*, 958

9 An indictment on 15 Geo. II. c. 12. need not state the property embezzled to be of any *value*, for the statute does not make the offences therein described *larceny*, but creates a *new felony*, *Aslett's case*...958

10 By 8 Geo. I. c. 22. s. 1. 31 Geo. II. c. 22. s. 77. forging the hand-writing of proprietors of public funds, or the dividends thereof; or of annuities or the dividends thereof; or to personate such proprietors, and thereby transferring or endeavouring to transfer or receive the same, &c. &c. &c. is felony without clergy, *Parr's Case*..... 435

11 Obtaining and indorsing a dividend warrant at the Bank, in the name of a stock-holder, is personating a proprietor, and thereby endeavouring to receive the dividend, although no attempt whatever is made to receive the money at the Pay Office, *Parr's case*...434

12 By 15 Geo. II. c. 13. s. 11. forging or altering any bank-note, bank bill of exchange, dividend warrant, or any bond or obligation under the seal of the Bank, or any indorsement thereon; or offering, disposing of, or putting away the same, or demanding payment thereof; is felony without clergy.....982

13 In a charge on this statute for "forging a paper-writing purporting to be a bank-note," the resemblance must appear on the face of the instrument, and cannot be supplied by what the prisoner said: therefore an instrument in all other respects like a bank-note, concluding "*For Self and Co.* of MY *Bank in England*," but without any name signed cannot purport to be a bank-note, *Jones's case* 204

14 But by 52 Geo. III. c. 138. s. 9. to make or utter any papers so nearly resembling bank-notes, as to impose on ignorant and unwary persons, is transportable felony.

15 By 2 Geo. II. c. 25. to forge or utter any bill of exchange, promissory note for payment of money, &c. with intent by 31 Geo. II. c. 22. s. 78. to defraud any corporation, is a capital offence..... 176

16 By 7 Geo. II. c. 22. to forge or utter, *inter alia*, any warrant or order for payment of money, &c. with intent by 18 Geo. III. c. 18. to defraud any corporation, is a capital offence 182, 183

17 It is usual in indictments for forging bank-notes, to insert a count on the statute 2 Geo. II. c. 25. in cases where any difficulty arises on the statute 15 Geo. II. c. 13. s. 11. *Jones's case* ... .204

18 And in an indictment on this statute, it has been held that a counterfeit bank-note without the *water mark*, is a forged *promissory note* for payment of money, within the act, though the word *pounds* be omitted in the body of it, if there be the white letters on the black ground, denoting the sum at the corner of it, *Elliot's case* 176

19 The cashier whose name purports to be signed to the forged bank-notes, has been admitted to prove that his name so signed is not his hand-writing; for he is not personally responsible by his signing

notes for and in the name of the Bank, *Newland's case*.....311

20 It may be disproved by any other person who is acquainted with the cashier's hand-writing, *Hughes's case*..... 311, *notis.*

21 So it may be disproved by evidence which shews that the note is false in all its parts, as in the texture of the paper, the water mark, the engraving, the ink, and the date of the year, *Mc Guire's case*, 311, *notis.*

22 By 45 Geo. III. c. 89. to forge a promissory note for payment of money, or a bank-note, or to offer, or dispose of, or put away the same, or to demand the money pretended to be due thereon, of the Bank or any of the Bank clerks, with intent to defraud the Bank of England, is a capital offence 1019

23 In an indictment on this statute it is not necessary to state the names of the persons to whom, or the manner in which such forged notes are disposed of and put away, *Holden's case*.....1019

24 Persons selling such forged notes at an under price, not as genuine, but as forged notes, within the knowledge of the purchasers, is a putting away within the act, although the purchasers were employed so to do by the Bank, for the purpose of detecting the offenders, *Holden's case*.....1019

25 By 41 Geo. III. c. 39. the unauthorized possession of any instrument for making bank-note paper, is felony 1052

BANK-NOTES.

1 The 2 Geo. II. c. 25. s. 3. enacts, that whoever shall *steal any bank-notes*, &c. shall be guilty of felony, notwithstanding *any* of the instruments particularized may be termed in law a *chose in action*; and therefore, although this act is in the plural number, the stealing of a single note is within the act, *Hassell's case*.....3

2 A forged *note*, in the form of a *Bank-note*, and intended to resemble a Bank-note, although the word "*pounds*" be omitted in the body of it; and there be no *water-mark* in the paper, but having the word FIFTY at the bottom of it, is a *counterfeit note "for the payment of money,"* if the jury find it to be intended as a note for fifty pounds; for in forgery there need not be an exact resemblance; it is sufficient if the instrument is *prima facie* fitted to pass for a true instrument, *Elliot's case*.....175

3 It is not felony to receive a Bank-note, knowing it to have been stolen, *Sadi and Morris's case*, 468

4 Bank-notes are goods and chattels within the statute 12 Ann. c. 7. *Dean's case*.....693

5 A Bank-note is a valuable thing within the meaning of the statute 9 Geo. I. c. 22. *Robinson's case*...749

6 A forged Bank-note, to be the subject of prosecution, must have similitude to a genuine Bank-note; but a note in the form of a Bank-note, concluding "for Self and Company of my Bank in England," is not sufficiently similar, though drawn on thin paper like the Bank paper, *Jones's case*.....204

7 A Bank-note that has been *paid* by the Bank, and filed, though it is no longer a *note* within the 2 Geo. II. c. 25. as a *chose in action*, yet it still continues to be part of *the effects* of the Bank, within 15 Geo. II. c. 13. s. 12. *Bakewell's case*.....943

BANKRUPT.

1 An indictment on the 5 Geo. II. c. 30. against a bankrupt for not sub-

mitting to be examined, must state that a commission had *duly issued;* that he was required to surrender to the commissioners, *or the major part of them;* and that they were commissioners *of bankrupts:* and *the names* of the commissioners must be stated in the notice, *Frith's case*.....10

2 It was once held that a bankrupt committed by the commissioners for not giving *satisfactory* answers on his examination, might obtain his discharge by *habeas corpus,* if the commissioners mistook *improbable* for *unsatisfactory* answers, *Pedley's case* 325

3 But the doctrine of the above case is now exploded, and if a bankrupt swears to an account clearly incredible he may be committed, *Ex-parte Nowlan*.....327, *notis.*

4 A commission stated to have issued under the Great Seal of *Great Britain* is sufficiently proved by a commission under the Great Seal of *Great Britain* AND *Ireland, Bullock's case*.....996

5 An act of bankruptcy may be proved before the commissioners by a creditor under the commission, *ibid*.....998

6 A bankrupt cannot defeat his commission by shewing a prior secret act of bankruptcy, *ibid* 999

7 A commission of bankrupt is good under a treble sixpenny stamp, *ibid,* 999

8 If a bankrupt be legally committed for not answering questions, it is incumbent on *him* to give *notice* when he will *submit* to answer the questions put.....326, *notis*

BIGAMY.

1 By 1 Jac. I. c. 11. if any person in England or Wales, being married, do marry any person, the former husband or wife being alive, they shall suffer death, as in cases of felony; but this is within clergy; and by 18 Eliz. c. 7. the offender may be imprisoned a year; or by 19 Geo. III. c. 74. fined and whipped; or by 35 Geo. III. c. 67. transported, 146

2 And the offender may be tried in the county where the fact was committed, or the offender apprehended; but these facts must be proved respectively, *Forsyth's case*.....826

3 An indictment for *bigamy* will lie, notwithstanding the party has obtained a sentence of *jactitation* in the Spiritual Court; for the validity of such sentence may be impeached, as having been fraudulently obtained, *Duch. of Kingston's case,* 146

4 A *pecress* convicted of bigamy shall, on having her clergy allowed, be immediately discharged, *ibid*...148

BLACK ACT.

1 By 9 Geo. I. c. 22. the offence of setting fire to any house, barn, out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood, is ousted of clergy.....50

2 By 9 Geo. III. c. 29. the Black Act is extended to wind, water, or other mills .....1007, *notis.*

3 By 43 Geo. III. c. 58. it is further extended to any house, barn, granary, hop-oast, malt-house, stable, coach-house, out-house, mill, warehouse, or shop 1007

4 By 9 Geo. I. c. 22. to maliciously kill, maim, or wound any cattle, is death, without clergy.....72

5 By 9 Geo. I. c. 22. wilfully to shoot at any person is death without clergy.....64

6 By 43 Geo. III. c. 58. this offence is extended to other cases of the like kind 952

7 By 9 Geo. I. c. 22. hunting in disguise any fallow deer, was death, 271

8 By 16 Geo. III. c. 30. the punishment reduced to transportation, 272

9 By 42 Geo. III. c. 107. stealing fallow deer is a misdemeanor for the first offence, for the second, &c. felony and transportation, 274, *notis*

BONDS.

1 It was not felony by the common law, or by the 2 Geo. II. c. 25. s. 3. for a cashier of the Bank to embezzle an India bond deposited in his care, pursuant to the 12 Geo. I. c. 32. but never put into the cellar in which the Bank usually kept such securities, and therefore never having been in the possession of the Bank, they could not be feloniously taken from the Bank, *Waite's case*, 28

2 But now by 15 Geo. II. c. 13. "if any officer or servant of the Bank being *intrusted* with any *bond*, &c. belonging to the said Company, &c. shall secrete, embezzle, or run away with the same," he shall suffer death, without clergy, *Waite's case*.....32

BREACH OF TRUST.

1 A breach of trust extends only to *the very thing* committed for *the special purpose*, to the custody of the trustee; as *the bale of goods* delivered to a carrier, or *the letter* delivered to a postman; and therefore if the one open the bale, or the other the letter, and steal the contents, it is a felonious taking from the possession of the owner, *Hassell's case*.....4

2 But if the very thing be committed to his trust by third persons, he has such *a possession* as will prevent the conversion of it to his own use from being considered felony, except he had previously delivered it over into the possession of those on whose account he received it, *Waite's case*.....30

3 But now breaches of trust, with respect to the servants of THE BANK, are made felonies by 15 Geo. II. c. 13. s. 12.....31

4 So respecting servants of THE POST OFFICE, by 5 Geo. III. c. 25. s. 17. and 7 Geo. III. c. 50. s. 1 106

5 So respecting the servants of BANKERS, Merchants and others, by 39 Geo. III. c. 85 849

6 So with respect to bankers, merchants, brokers, attornies, or other agents of any description whatsoever, by 52 Geo. III. c. 63....1082

BROKERS.

1 Breach of trust by brokers, punishable by the 52 Geo. III. c. 63...1082

BURGLARY.

1 There are two species of burglary quite distinct from each other in their consequences, viz. burglary and stealing, and burglary with intent to steal, *Vandercomb and Abbott's case*.....708

2 On an indictment for burglary, if the offence be laid to consist in an *actual felony*, and not merely in the *intent to steal*, a verdict "not guilty of the *burglary*, but guilty of *stealing in the dwelling-house*" is good as for a capital offence, *Comer's case*, 36, *notis*.

3 On an indictment for *burglary*, the prisoner may be found *not guilty* of the breaking and entering in the night, but *guilty* of stealing in the dwelling-house, *Withal and Overand's case*.....88

4 And this is the correct form of entering the verdict in such case on the record, *Hungerford's case*, 37, *notis*.

5 A lodging-room in which a burglary is committed, may be laid to

be the dwelling-house of *the lodger*, if the owner of the premises do not sleep under the same roof, *Rex* v. *Rogers*.....89

6 Burglary may be committed in a garret which is made use of as a work-shop, and rented together with a sleeping-room in the same house, provided the landlord do not sleep under the same roof, for it is then the *mansion-house* of the lodger, *Richard Carrell's case*.....237

7 Burglary cannot be committed in *an out-house*, though occupied with the dwelling-house, if it be separated therefrom by an open passage eight feet wide, and not connected with it by any fence inclosing them, *Garland's case*.....144

8 Burglary may be committed in a *bake-house*, although it stand eight or nine yards from the *dwelling-house*, and only a paling between them, *Castle's case*.....144, *notis.*

9 But burglary cannot be committed in any *out-building* so remote from the dwelling-house as not to be considered within its *curtilage*, 144, *notis.*

10 Burglary cannot be committed in a house under repair, although part of the property of its owner be there deposited; for until he *take possession with intent to inhabit*, it cannot be considered as his mansion or dwelling-house, *Lyon Lyon's case*.....185

11 Therefore, where a prosecutor had only deposited goods in a house he had taken, but neither he or his servants had ever slept therein, it was held not to be his dwelling-house, *Harris's case*.....701

12 So where the owner had actually moved a great part of his household furniture into the house which he locked up over night, and the house was broke and the goods taken away before day-light the next morning, it was held not to be a *dwelling-house*, neither the owner nor any person on his account having slept therein, *Norreg Thompson's case*.....771

13 So where a brewer purchased the lease of a public-house, and a great part of the furniture of the outgone tenant, with a view to accommodate the in-going tenant, and the house was broke open before it was re-occupied by any person, it was held not to be a dwelling-house, *Davis's case*.....876

14 So burglary cannot be committed in an unfinished house, if neither the owner nor his servants have taken possession of it, although *one of the workmen of the owner* sleep therein for the purpose of protecting it, *Fuller's case*.....186, *notis.*

15 The punishment of burglary it is said was intended to protect the *actual occupant* from the terror of disturbance during the hours of darkness and repose, and therefore the agent of a trading company, who is permitted to reside in the house, is actual occupier of it, *Margett's case*.....931

16 The *name of the owner* of the house in which a burglary is committed, must be stated in the indictment, *White's case*.....252

17 Burglary may be committed in *lofts* built over coach-houses, if they are converted into sleeping rooms, and there is an outer door to them common to each respective occupier; for each apartment is, in such case, the mansion-house of each inhabitant, although originally intended to be used only as hay-lofts, *Thomas Turner's case*.....905

18 If burglary be committed in the occupied part of the *Invalid Office* at *Chelsea*, the under part of which is used for the purposes of Government, it shall be laid to be the mansion-house of the King, *Peyton's case*.....324

19 If burglary be committed in any of the apartments of *a palace*, as *Whitehall*, though legally occupied by permission of the King, the indictment must state it to be the mansion-house of the King, and not of the occupier, *Sir H. Hungate's case*.....324, *notis.*

20 A burglary laid to be in the dwelling-house of one of the Officers belonging to THE CORPORATION of *the African Company* is bad, although an Officer of the Corporation reside in the apartments broken open; for it is, by intendment of law, the dwelling-house of the Corporation, although none of the Company ever sleep therein, *Ann Hawkins's case*, 324, *notis.*

21 But if an agent or manager of the concerns of a trading Company, the members of which reside at *Whitney*, be permitted to live in the house in London where the business is carried on, in diminution of the amount of salary he would otherwise have received, and burglary be committed therein, it may be laid the dwelling-house of *the agent*, though the rent and taxes of the whole premises are paid by the Company; for *the agent* is the only person whose nocturnal safety and repose can be endangered by such an offence, *Margett's case* 930

22 So if a *City Hall*, occupied by the Clerk of *the Company*, be burglariously broken, it may be laid to be the dwelling-house of *the Clerk*; for he is the person whose nocturnal repose the law of burglary intends to protect .....931, *notis.*

23 But if a College at Cambridge be broken, it must be laid the mansion of the master, fellows, and scholars, *Maynard's case*, 2 East, 501

24 So if the servant of a banker be merely suffered to sleep in the upper room over the shop, though he receive less wages on that account and has a separate door to his part of the house, it must be laid the dwelling-house of the banker, though he never sleeps therein, if there be no *demise* of the upper room to the servant, *Stock* and *Edward's case*.....1015

25 So if a farmer's servant reside with his family in a cottage, which is part of the farmer's house, and a barn under the same roof be broken open, the barn is still part of the farmer's dwelling-house, although the servant slept in the barn for the purpose of protecting the premises, *Brown's case*, 1018, *notis.*

26 Burglary therefore may be committed in *a shop* adjoining to a house, if under the same roof, and within the curtilage, although there be no internal communication between the shop and the house, and no person sleep in the shop, *Gibson, Mutton, and Wigg's case*.....357

27 But burglary cannot be committed in *a center building* used merely as a partnership counting-house, but having no internal communication with the dwelling-house which formed the wings, although the whole pile is under the same roof, *Egginton's case*.....913

28 To constitute burglary there must be both a breaking and entering; and the *breaking* must be such as will afford the burglar an opportunity of *entering* so as to commit the felony, *Hughes's case*.....406

29 To push up folding doors which remain closed by their own weight, but without any interior fastening, so that those without could by moderate exertion open them, is a sufficient *breaking* to constitute this offence, *Brown's case*....1016, *notis.*

30 An entry obtained by fraud and under *colour of law*, is sufficient to

constitute the crime of burglary, *Farr's case*.....1064, *notis.*

31 Burglary may be committed in any of the *rooms* of a house, the whole of which is let out in lodgings, and has one common door to all its inmates; for, in such case, each lodging is the mansion of its inhabitant, *Trapshaw's case*.....427

32 If burglary be committed in one of two adjoining houses belonging to two partners, it may be laid to be the separate mansion of its inhabitant, if there be no internal communication from the one to the other, although the rent and taxes of the house are paid out of the partnership fund, *Martha Jones's case*.....537

33 A plea of *autrefois acquit* of a burglary, where the felony is laid as *actually committed*, cannot be pleaded to an indictment for the *same burglary* laid *with intent to commit* the felony; for they are two distinct and different offences, *Vandercomb and Abbot's case*...708

34 An indictment for burglariously breaking and entering the house of *A.* with intent to steal the goods of *B.* although no person of the name of *B.* had any property in the house, is good, *Jenks's case*.....774

C.

CATTLE.

1 By 14 Geo. II. c. 6. and 15 Geo. II. c. 34. to drive away or in any other manner to steal any sheep, bull, cow, ox, steer, bullock, heifer, calf, or lamb; or to kill the same, with intent to steal the carcase, or any part thereof, is felony without clergy.....72

2 *Horses*, *mares*, and *colts*, are included under the word *cattle*, as used in the statute of 9 Geo. I. c. 22. and therefore in an indictment for killing *a mare* and *a colt*, it is not necessary to *aver* that they are *cattle*, *Paty's case*.....72

3 *Cows* and *heifers* are distinct species of *cattle* within the meaning of the 14 Geo. II. c. 6. and 15 Geo. II. c. 34. and therefore an indictment for stealing the one is not supported by evidence of stealing the other, *R. Cooke's case*.....105

See Maiming.

CHALLENGE.

1 If a sheriff return a jury to try an indictment in which he is prosecutor, it is *good cause* to challenge the jury, *Conrad Sheppard's case*, 101

2 On issue joined on the replication of *nul tiel record* to a counterplea of felony, the prisoner may challenge any of the jurors before they are sworn, *Scott's case*.....404

CHECK.

1 If a person purchase goods, telling the vendor he will on delivery give him *his draft* on his banker for the amount, and he gives him *his* draft on a banker on whom he had no authority to draw, and which he knew at the time would not be paid, yet this is not a fraud at common law; for this check intitled the drawer to no more *credit* than his bare assertion that the money would be paid, *Lara's case*, 647

2 A check on a banker, while it remains undisposed of in the hands of the drawer, is not an available security within the statute 2 Geo. II. c. 25., *Walsh's case*.....1061

3 But it is said that *a check* is a false pretence within 30 Geo. II. c. 24. if given by a person who knows it will not be paid.....656, *notis.*

4 By 41 Geo. III. c. 57. the making of blank checks of any banker is a misdemeanor.

5 A check, though known in the commercial world by that name only, may be laid as an order for payment of money.....886, *notis.*

6 A check, though illegal for want of a stamp, may be given in evidence to prove the stealing of *the letter* in which it was contained, *Pooley's case*.....900

7 Obtaining goods by giving a check on a bank, which the giver knows will not be paid, is an indictable offence, *Jackson's case*....656, *notis.*

CHESHIRE.

1 Cheshire is not to be considered as an English county within either the 26 Geo. II. c. 19. or 26 Hen. VIII. c. 6. *Parry's case*.....108

CHURCH.

1 A church is a building within the statute 4 Geo. II. c. 32. against the stealing lead fixed to any building, *Hickman's case*.....318

2 The property of lead affixed to a church, cannot be laid to be either in *the churchwardens*, or in the *inhabitants and parishioners*, *Parker's case*.....320, *notis.*

3 But if so laid, it may be rejected as surplusage, *Isley's case*.....320

CLERGY.

1 A peeress convicted of felony within clergy, shall be discharged without burning or imprisonment, *Duchess of Kingston's case*.....146

2 A prisoner who is a second time convicted of single felony, and has had his clergy once, may be debarred of it on the second conviction by means of a counter-plea, *Scott's case*.....401

3 To oust an offender of his clergy, for stealing to the amount of 40*s.* in a dwelling-house, the larceny must be of things under the protection of *the house*, and not of any *person* in it, and therefore not of *money* out of his pocket, *Owen's case*.....572

4 Or his watch and money, *Castledine's case*.....574, *notis.*

5 Or of a bank-note delivered to him to change from the purse of his landlady, *Watson's case*.....640

6 The reason assigned to shew the difficulties arising from *Poulter's case*, which occasioned the Legislature to oust arson of clergy by the 9 Geo. I. c. 22. *Spalding's case* 219, *notis.*

CLERK OF ASSIZE.

1 A *clerk of assize* and the Judge's marshalmen are entitled to their fees on a defendant's entering into a recognizance to appear, enter, and try his traverse of a misdemeanor, *Fry's case*.....111

2 A *clerk of assize* has not a lien upon the records in his custody for his fees; and if he draw an indictment with unnecessary prolixity, he may be ordered to pay the extraordinary expence, *Rex* v. *Bury*, 201

3 So if a *clerk of the peace*, in drawing an indictment for perjury, unnecessarily state all the continuances in the former prosecution, the Court of King's Bench will refer the record to the Master to see what part was unnecessary, *May's case*.....201, *notis.*

4 The *clerk of the arraigns* may plead to a counter-plea *ore tenus*, 404

5 To a plea of misnomer the *clerk of the arraigns* may reply, that the prisoner is known as well by the

one name as the *other, Dean's case*, 476

COACH-MASTER.

1 If the coach-glass of a gentleman's coach be stolen while it is standing in a coach-master's yard, it may be laid to be the property of the coach-master as well as of the owner, *Taylor's case* 356

2 Goods stolen from a stage-coach may be laid the property of the coach-master or the coachman, *Deakin's case* 862

COIN.

1 By 25 Edw. III. st. 5. c. 2. if a man counterfeit the King's money, he is guilty of high treason.....76

2 By 8 & 9 Will. III. c. 26. s. 3. if any person shall mark on the edges of any of the current coin, or diminished coin, or of any counterfeit coin, with letters or grainings, or other marks or figures like unto those on the edges of money coined at the Mint, he, his counsellors, procurers, aiders and abettors, shall be guilty of high treason, 622

3 By 8 & 9 Will. III. c. 26. s. 4. if any person shall colour, gild, or case over with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling the current coin—or any round blank of base metal, or of coarse gold or coarse silver, of a fit size or figure to be coined into counterfeit milled money resembling any of the gold or silver coin—or shall gild over any silver blanks resembling the gold coin, he shall be guilty of high treason.....154

4 By 15 Geo. II. c. 28. s. 1. if any person shall wash, gild or colour any shilling or sixpence, good or bad, or add to or alter the impression on them, with intent to make them resemble a guinea or a half-guinea, or any halfpenny or farthing, with intent to make them pass for a shilling or a sixpence, he shall be guilty of high treason, 154

5 By 8 & 9 Will. III. c. 26. s. 1. making, mending, or having possession of instruments for coining, is felony.....90

6 Having the possession of coining instruments, with intention to coin, and a piece of counterfeit money, with intention to pay it away as and for good money, is an indictable offence at common law, *William Parker's case*.....41

7 A counterfeit piece of gold, intended to represent the gold coin, of a form so imperfect as not to be passable, is not high treason; for a counterfeit must have sufficient *similitude* to the legal current coin to make it passable, *Varley's case*.....,76

8 For the counterfeit money must be in a *passable state*, and therefore where blank shillings are found before they have been rubbed, filed, and thrown into *aqua fortis*, this process being necessary to make such round blanks current, the offence is not complete, *Harris and Minion's case*.....136

9 The custody of *a mould*, on which is made and impressed the similitude of one of the sides of a shilling, is within 8 & 9 Will. III. c. 26. *Lennard's case* 90

10 A mould which has the *concave* form and figures of the current coin, is *a tool* on which is made and impressed the similitude of the current coin, although in the coin itself the form and figures are *convex, Lennard's case* 90

11 A count on the 25 Edw. III. c. 2. for high treason in coining a shilling, and another count on the 8 & 9 Will. III. c. 26. for counterfeiting to the likeness and similitude of the current coin, ought not to be

joined in the same indictment, *Harris and Minion's case* 135

12 It is not necessary in an indictment on 15 Geo. II. c. 28. charging the offence of repeated utterings within ten days to shew that in the original indictment the offender was adjudged A COMMON UTTERER, *Michel's case* 938

13 For the fact of the prisoner being a *common utterer* of base money is a necessary *conclusion of law*, and therefore need not be averred in an indictment on 15 Geo. II. c. 28. for repeated utterings, &c. *Smith's case*.....858

14 The charge in an indictment on 15 Geo. II. c. 28. s. 3. for uttering false money twice or oftener within ten days, must, to warrant the year's imprisonment inflicted by the third section of the Act, be contained in *one count*, *E. Tandy's case* 833

15 Therefore where the first count charged, that A. on the 15th April was tried and convicted of uttering a sixpence, and that he was thereupon ordered and adjudged to be imprisoned one year; and the second count charged him with having uttered a half-crown on the 23d August, the indictment was held bad, *Smith's case*.....856

16 A conviction on 15 Geo. II. c. 28. for two utterings on *the same day*, will warrant the year's imprisonment, though the indictment charge the first uttering on 14*th February*, and "*that on the said 14th February he uttered*, &c.;" for, being *a material averment*, it shall be taken to have been proved that both utterings were on *the same day*, *Martin's case* 923

17 An indictment on the 15 Geo. II. c. 28. for uttering counterfeit money, having at the same time other counterfeit money in custody, is good, although it do not allege the offender to be *a common utterer of false money*, *Smith's case* 1091

18 This statute, though the words are general, "false and counterfeit "*money*," does not extend to *copper coin*, *Cirwan's case*...834, *notis*.

19 To convict a prisoner on the 8 & 9 Will. III. c. 26. it must appear that the counterfeit money found in his custody was passable, and that the prisoner was possessed of all the implements and ingredients necessary to make such counterfeit money, *Harris and Minion's case* 135

20 The process of extracting latent silver from the body to the surface of base metal, by the power of *aqua fortis*, is a colouring within the words "shall colour with any "materials producing the colour of "silver," the 8 & 9 Will. III. c. 26. s. 4. *Lavey and Parker's case*, 153

21 As where the prisoner was apprehended in the very act of steeping round blanks of brass and silver in *aqua fortis*, which, when taken out, exhibited the appearance of lead, with the impression of a shilling on some of them, and which, by rubbing them, would perfectly resemble the silver coin, but in their then state would not pass current, yet the offence was held to be complete, for that these pieces were *coloured with materials which produced the colour of silver*, which is the very act prohibited by the statute, and that it was not necessary that the pieces so coloured should be current, *Rex* v. *William Case*, 154, *notis*.

22 Having knowingly in possession *a puncheon* for the purpose of coining, is within the meaning of the 8 & 9 Will. III. c. 26. *Rowland Ridgley's case* 189

23 Counterfeit monies are not to be considered as *paid and put off*, within the meaning of 8 & 9 Will.

III. c. 26. until the purchaser has paid the price agreed on, although the seller had actually counted out to him the quantity bargained for, for the offence is not completed until the base monies have been *taken possession of* by the purchaser, *Wooldridge's case* 307

24 To make a round blank like the smooth shillings in circulation, the original impression on which has been effaced by time, is counterfeiting to the likeness and similitude of the good, legal, and current coin of the realm called a shilling, *Samuel Wilson's case* 285

25 And therefore a counterfeit shilling produced in evidence, although it is quite smooth, and no impression of any sort discernible on it, will support an indictment for counterfeiting to the *similitude* of the legal coin; for it is not necessary that there should be an *impression* on the counterfeit; if it resemble the common worn coin it is sufficient, *J. and P. Welch's case*, 364

26 An indictment for putting off counterfeit *milled money* is supported by evidence that the prisoner put off counterfeit money, though such money was not *edged*, *Bunning's case* 621

27 An indictment on the 15 Geo. II. c. 28. for *uttering* bad money by the common trick called *ringing the changes*, is good, although it do not state that it was uttered *in payment as and for good money*; for the words of the statute are in the disjunctive, "utter or tender in "payment." *Franks's case*.....644

28 By 51 Geo. III. c. 127. and 52 Geo. III. c. 50. to pay or receive any of the *gold coin* for more than its true lawful value is a high misdemeanor.....1072, *notis.*

COMMITMENT.

1 A commitment for "*treasonable "practices*" is too uncertain and vague; for commitments for high treason ought to contain the greatest certainty, otherwise the prisoner is entitled to be bailed, *Rex* v. *Sayre*.....162, *cited.*

2 So a commitment for *stealing* a variety of things, without saying that the prisoner *feloniously* stole them, would be bad from its uncertainty, although it is well known, from the very import of the word *stealing*, that it is felony.....162

3 But on an application to be bailed, it is not necessary that the fact imputed to the prisoner by the warrant should be therein expressly charged to have been done *feloniously*, it is sufficient if the facts stated appear to be in law a felony, *Rex* v. *Judd*.....484

4 But a warrant of commitment need only to contain *convenient certainty*; and therefore it is not necessary to *allege* that the charge was made upon *oath*, *Platt's case*, 167

5 A commitment for high treason at *Savannah*, in the colony of *Georgia*, in *North America*, is sufficient to shew that it was committed *without the realm of England*, according to 35 Henry VIII. c. 2. for it cannot be intended that there is any place *within the realm* known by that description, *Rex* v. *Platt*, 167

6 A commitment under 19 Geo. II. c. 34. for rescuing smuggled goods, need not state that the prisoner was armed; "that he, with others "armed, &c." is sufficient; for though the statute says, "that if "any person or persons, to the "number of three or more, *armed* "with fire-arms, or other offen-"sive weapons, &c." it is not necessary that every person present should be individually armed, *Franklyn's case* 255

7 The 9 Geo. I. c. 22. makes it fe-

lony to set fire to "any cock, mow, "or stack of corn, straw, hay, or "wood;" a commitment, therefore, for setting fire to *a parcel* of unthreshed wheat is bad for its uncertainty; for the word *parcel* is not mentioned in the Act, and cannot be taken *ex vi termini* to describe either a cock, a mow, or a stack of corn, *Rex* v. *Judd*.....484

3 So on 7 Geo. II. c. 21. which makes it felony to assault any person with an *offensive weapon*, or by menaces, or by any forcible or violent manner to demand money, goods, or chattels, with intent to steal them; a commitment "for "that with force and arms he made "an assault on A.B. with intent the "monies of the said A. B. to steal, "&c." without saying it was made with *an offensive weapon*, or that by *menaces*, or in *a violent manner*, he *demanded* the monies, &c. is bad; for though a *commitment* need not be drawn with the same precision as an *indictment*, yet the terms of the statute must be more exactly pursued; and this does not even charge him with a "felonious in-"tent to rob," but merely with intent to steal, &c. *Remnant's case*, 583

CONFESSION.

1 A confession induced by saying, "*Unless you give me a more satis-*"*factory account, I will take you* "*before a magistrate*," or by saying, "*Tell me where the things are,* "*and I will be favourable to you*," cannot be given in evidence, *Jacob Thompson's case* 291

2 The confession of a prisoner on his examination before a magistrate, shall be presumed to have been taken in writing, unless the contrary appear, *Rex* v. *Jacob and others*, 309

3 A prisoner may be convicted on the single and uncorroborated evidence of his own confession, *A. Fisher's case* .....311, *notis.*

4 If a person indicted for larceny, by an extorted confession, discover the person to whom he sold the stolen goods, that person may give evidence as to *that fact* against the prisoner, *Lockhart's case*, 386

5 For though confessions obtained in consequence of *promises* or *threats* cannot be given in evidence; any *facts*, though resulting from such inadmissible confession, may be received, *Warickshall's case*.....260

6 But the conversation or confession of a prisoner cannot be coupled with such facts to make out the charge against a prisoner; and therefore, unless they can be given in evidence distinctly, and without the aid of the confession, they shall be rejected, *D. Mosey's case*, 265, *notis.*

7 And in the case of Rex v. Harvey, Bodmin Summer Assizes, 1800, Lord Eldon said, facts resulting from extorted confessions should be rejected unless the fact itself would warrant the conviction, without any confession leading to it. 2 East. 638

8 *Sed quære* as to so much of the confession as relates strictly to the fact discovered by it, *Butcher's case*, 265, *notis.*

9 Parol evidence cannot be received of the information given before a magistrate, either in felony or misdemeanor, unless proof be given that it was not reduced into writing, *Fearshire's case* 202

10 A voluntary confession of felony made by a prisoner on his examination before a magistrate, and reduced by the magistrate into writing, may be given in evidence on the trial, though the magistrate has neglected, and the prisoner has

refused, to sign it, *Lambe's case*, 552

1 But a prisoner may retract what he has said on his examination, *Bennett's case* .....553, *notis.*

12 Minutes taken of an examination before a magistrate by the Solicitor for a prosecution, by the direction of the magistrate, in which the prisoner retracted part of what he had before *confessed*, and which examination was neither signed by the magistrate or the prisoner, has, on the authority of *Lambe's case*, been allowed to be read in evidence on the trial, *Thomas's case*.....637

13 A confession made under the expectation of being admitted a witness for the Crown, is not a voluntary confession, *Hall's case*, 559 *cited.*

14 A confession can only affect the person out of whose mouth it comes; it is evidence against him; but not against others, *Hevey's case* 235

CONSPIRACY.

1 If a man-servant marry a woman-servant, in the name of the master, with an intent thereby to raise a specious title to his estate and effects, it is an indictable conspiracy, *Robinson and Taylor's case*, 37

2 If A. B. and C. conspire that B. shall *accept* a fictitious bill of exchange, in order that A. should, by such acceptance, and by the name of C. being indorsed thereon, *as payee*, negotiate the same as and for a good bill of exchange, and attempt to negotiate it in pursuance of such conspiracy, they may be indicted for the fraud, *Hevey's case*, 232

3 An indictment for a conspiracy *by indirect means*, to impoverish a man by preventing him from working at his trade, need not state the *overt acts* used to effect the intended mischief, *Eccles's case* 274

4 An indictment for conspiring to indict another for a capital offence, and indicting him, is good without the word *falsely*, *Sprugg's case*, 277, *notis.*

5 If two conspire, and one die, the other may be indicted for the conspiracy, *Nichol's case* ...277, *notis.*

6 The fact of conspiring need not be positively proved, but may be collected from the circumstances of the case, *Parsons's case*, 277 *in margin.*

7 Persons in possession of any articles may sell them at what prices they please; but if they confederate and agree not to sell them under certain prices, this is conspiracy.....276

8 So a combination of journeymen, not to work under certain prices, is an indictable offence. 277

9 But if three persons, as the drawer, acceptor, and payee, draw a bill in *their own names*, purporting to be a bill drawn on the firm of a banking-house that has no existence, and negotiate it as a good bill, it is no forgery, and *qu.* if conspiracy, *Hevey's case* 232

10 A person who has been convicted of conspiracy, cannot afterwards be a witness; and he may be examined as to the fact of conviction on a *voir dire*, *Priddle's case*, 442

COPY OF INDICTMENT.

1 A prisoner is not entitled to a copy of his indictment to enable him to plead *autrefois acquit*, *Vandercomb's case* 821

2 A prisoner, on being acquitted, is not entitled to a copy of his indict-

ment from the *Judge*, although the prosecution bears the strongest mark of being unfounded and malicious; but every prisoner acquitted has a right to a copy of the record, and after demand of it, the officer who ought to make it out, may be punished for refusing it, *Brangram's case*.....27

3 But by an order in writing, made by five Judges, 16 Car. II. and confirmed in May Session 1739, at the *Old Bailey, a copy of indictment* shall not be granted without a special order made in open Court for that purpose.....28, *notis.*

4 And the Court, in exercising its discretion, refused to grant a copy of the indictment where the acquittal was in consequence of the incompetency of a witness, *Quick's case*.....28, *notis.*

CORONER.

1 A Coroner, on an inquisition *super visum corporis*, ought to hear evidence *on oath*, not only on the part of the Crown, but on the part of the person accused, *Scorey's case*.....43

2 To make depositions before a Coroner evidence, it must not only be proved that he and the deponent are dead, but also that he signed the deposition, *England's case*, 771, *text.*

3 The Court of King's Bench will grant a criminal information against a Coroner for acting improperly in taking an inquest of murder, *Scorey's case*.....43

CORPORATION.

1 By 31 Geo. II. c. 22. s. 73. & 18 Geo. III. c. 18. to forge, &c. the instruments mentioned in 2 Geo. II. c. 25. & 7 Geo. II. c. 22. with intent to defraud any corporation, is capital felony, *Harrison's case*, 180

2 A policy of insurance from fire by a corporation must be under the corporation seal, and so must every indorsement thereon, *Gillson's case*, 1007

3 A corporation must prosecute in their corporate name, *Pepper and Patrick's case*.....253

4 Therefore, as the 17 Geo. III. c. 17. had incorporated the churchwardens of Enfield by the name of "The Churchwardens of the Parish "Church of Enfield, in the County "of Middlesex," an indictment for stealing their property, stating it to belong to *J. Brown* and *George Cook*, is bad, though it afterwards adds, "the said J. B. and G. C. "being then the Churchwardens "of the Parish Church of Enfield "in the County of Middlesex" *ibid.* 253

COUNTERPLEA.

1 In a counterplea of clergy, it is not necessary to set out the tenor of the indictment on which the prisoner was convicted, *Scott's case*, 401

2 If there be any material variance between the original indictment and that stated in the counterplea, it cannot be taken advantage of on the counterplea, for the defects in the original indictment are matters of error, *Scott's case*..... 405

3 The Court will give a prisoner, against whom a counterplea of clergy has been filed, time till the ensuing Session to frame a replication to it, *Dean's case*.....476

COUNTY.

1 Robbery must be proved in the county laid in the indictment, *Thomas's case*...634. But see now 42 Geo. III. c. 81. s. 3.

2 *Cheshire*, properly speaking, is not an English county, and the King's writ does not run there; but it has always been the practice to consider

Salop the next English county to *Wales, Parry and Roberts's case,* 108

3 Therefore the offence of plundering a wreck on the coast of *Anglesea,* contrary to the provisions 26 Geo. II. c. 19. may be tried in the county of *Salop* by virtue of 26 Hen. VIII. c. 6. s. 6. *Parry and Roberts's case*..... 109

4 And the provisions of 26 Hen. VIII. c. 6. which gives a general jurisdiction to English Judges to try offences committed in *Wales,* extends to *new-created felonies;* and the forging of excise stamps contrary to 49 Geo. III. c. 80. at *Llangeny,* in the county of *Brecon,* may be tried in the county of *Hereford, G. Window's Case*.....109, *notis.*

5 The words in the 26 Geo. II. c. 19. "in the next adjoining English "county to Wales," means, according to 26 Hen. VIII. c. 6. "where the King's writ runneth," *Parry and Roberts's case*.....109

COUNTRY BANKERS.

1 By the Stamp Acts 44 Geo. III. c. 98. & 48 Geo. III. c. 149. s. 13. country bankers are permitted to *reissue* certain notes during the term of three years, without new stamps, and *after such reissue* such notes shall be as available as they were upon the first issuing thereof, 1037

2 The paper and stamps of such notes as have been paid, *though not reissued,* is *valuable property* to the country banker; and any person who steals such notes while in a course of conveyance from London to the country, may be indicted for the larceny, *Clarke's case* 1036

3 So also, if such paid country banknotes be intercepted in their retrograde conveyance, and the place at which they were made payable in London be *altered* from an *insolvent* to a *solvent* house, the offender may be convicted of forgery, *Treble's case* 1040

CURTILAGE.

1 An out-house, separated from the mansion by an open passage eight feet wide, and not connected to the mansion by any fence, is not within the curtilage, *Garland's case* 144

D.

DEAD BODIES.

1 The dead bodies of executed convicts are at common law at the King's disposal; but by 25 Geo. II. c. 37. the dead bodies of *murderers* shall be delivered to the Surgeons' Company for dissection: in this and in *other cases,* the Judge may, after sentence pronounced, order them to be hung after execution in chains by a special order to the sheriff for that purpose, *Hall's case*.....21

2 Taking up dead bodies, though for the useful purposes of *scientific dissection,* is an indictable offence at common law, for it is *contra bonos mores, Lynn's case*..... 497

DEAF AND DUMB.

1 A prisoner though *deaf and dumb,* by the visitation of God, who is indicted for a capital offence, may be arraigned, if intelligence can be communicated to him by signs, &c. *T. Jones's case* 102

2 So a person, though *deaf* and *dumb,* may be sworn, and give evidence by means of signs and tokens, *Ruston's case* 408

3 A prisoner, though *dumb* by the visitation of God, may be arraigned and tried; and, if convicted, sen-

tenced and *transported*, *E. Steel's case* 452

4 But whether judgment of *death* can be given against a convict so circumstanced seems to be undetermined .....453, *notis.*

DEMAND.

1 It is said that a demand must be made or some action used, denoting, or equivalent to, a demand of money or goods, to constitute an offence within 7 Geo. II. c. 21. of assaulting another with intent to rob him; *Peter Parfait's case* 19

2 For that a demand either express or implied, is necessary on this branch of the statute, *W. Thomas's case*, 332

3 But the statute is in the disjunctive, "if any person shall with any offensive weapon maliciously assault —*or* shall by menaces, or in or by any forcible or violent manner, *demand* any money or goods from any other person with intent to rob such person, and therefore where, on the first branch of the statute, where the prisoner presented a pistol to a post-boy and bade him stop, but was apprehended *before any demand* was made, yet the offenders were convicted and transported, *Trusty and Howard's case*, 20, *notis.*

4 But an indictment on the second branch, charging the assault and a menace, without charging that *a demand* was made, was held bad, *Jackson and Randal's case* 269

5 A *demand* of money, venison, or other valuable thing, must be made to bring an offender within the 9 Geo. I. c. 22. respecting threatening letters, but a sufficient demand is made, by insinuating an intention in such letter to impute the crime of murder to the party, and requesting him to send a bank-note, although he pretend to ask it as *benevolence*, *Robinson's case*, 749

DEMURRER.

1 On a demurrer to an indictment, the Court must look into the whole record, to see whether they are warranted in giving judgment on it, and therefore it is open to objections, as well to the jurisdiction of the Court where it was found as to the subject-matter of the indictment, *Rex* v. *Fearnley* 425

2 A demurrer to an indictment is not an admission of the truth of every thing alleged in it, *Lyon's case* 597

3 A demurrer lies to a bill of discovery, if the bill suggest matter which amounts in law to a felony, *Green's case* 952

DYING DECLARATIONS.

1 The dying declaration of a person who is sensible of approaching dissolution, is considered in law as made under a sanction equal to that imposed by the solemnity of an oath 460

2 And therefore after decease may be given in evidence, although it do not *expressly* appear that the deceased was then under apprehension of impending death, *Woodcock's case*, 500

3 It is for *the Court*, and not *the Jury* to determine whether the party is or is not sensible of the awful nature of his situation, *John's case*, 504, *notis.*

4 But however certain and immediate ensuing death may be, yet if the patient from the cessation of pain in the case of incipient mortification, or from any other deluding cause, really entertain a hope of recovery, the dying declaration of such a patient cannot be received,

though warned of her approaching dissolution by those around her, *Wellborn's case*.....503, *notis.*

5 But wherever the patient appears clearly conscious that death is inevitable, his dying declaration is evidence *Dingler's case*.....561

E.

EMBEZZLEMENT.

1 The embezzlement act 39 Geo. III. c. 85. which makes it felony for a servant to embezzle monies, &c. paid to him for or on account of his master, extend to monies given by *his master* to *a third person*, and paid, to him, by such third person, *Whittingham's case* 912

2 For in such case the money so given by the master to such third person is out of the possession of the master, and therefore the receipt and embezzlement of it by the servant is an offence within the act, *Headge's case* 1033

3 If the money be received in a different county, from that in which the master lives, the indictment may lay the offence in the county in which the master resides, *Taylor's case* 974

4 And if such servant, on returning home, falsely denies having received the money, the indictment may be tried in the county in which he received it, for this false denial of the fact is evidence that he embezzled it at the time and place of receiving it, *Hobson's case* 975

5 The statute having particularly mentioned "bills and notes," it is sufficient to state them as bank-notes, as amounting together to such a sum, without averring the amount and denomination of each note, *Johnson's case* 1103

6 An indictment on 39 Geo. III. c. 85. must contain all the requisites of an indictment for *larceny* at common law, for it does not create a *new felony*, but only makes that a *larceny* which before was only *breach of trust*, *Mc. Gregor's case* ...932

ERROR.

See *Scott's case* 405

ESCAPE.

1 An indictment will not lie on the 16 Geo. II. c. 31. for facilitating the escape of a prisoner committed *on suspicion* only, *R. Walker's case*, 97

2 Therefore on the production of the warrant it appeared to be on *strong suspicion* of having been guilty of burglary in the house of, &c. stealing two sheets, it was decided that *Greeniff* who was charged with having aided and assisted the prisoner in an attempt to make his escape from the custody of the constable, was not guilty on this act, *Rex* v. *Greeniff* 363

3 Effecting an actual escape, is not within the statute 16 Geo. II. c. 31, *Tilley's case*.....662

EVIDENCE.

1 The person whose name purports to be signed to a *forged receipt* is not a competent witness to prove the forgery, for it is an established rule that no person who can derive any advantage from the conviction of a prisoner can be a witness for the Crown, for it tends to destroy an instrument on which, if genuine, he would be liable, *Russel's case* . 8

2 This rule however is founded on long and inveterate practice, and not on any analogous principle of law, *Crocker's case* 987

3 Therefore where *Dr. Dodd* was indicted for forging a paper-writing

purporting to be a bond signed *Chesterfield*, his lordship was held not competent to prove that the signature was not his hand-writing, without being released from the obligation, *Dodd's case*.....157

4 So the person whose name is forged to a scrip receipt, is not competent to prove the forgery, *Olier's case*, 812

5 So the assignee of a certificate to a navy bill, whose name is forged to a receipt for the money, cannot prove the falsity of the signature, *Thornton's case* 634

6 So the proprietor of stock who has been personated, cannot be called to deny the authenticity of his name signed on the receipt of the dividend, *Hart's case* 438

7 Nor the supposed drawer of a promissory note, *Crocker's case* ... 987

8 This rule of evidence is an anomaly in the law of evidence, but it is now so firmly settled by long practice, that it cannot be reformed except by the Legislature, *Crocker's case* 987

9 And it seems that as the party whose name purports to be signed to the forged instrument, cannot be admitted directly to deny that it is his hand-writing, so he is not competent to prove any *collateral fact*, which in its immediate effect indirectly proves the forgery, *Crocker's case* 987

10 Except under circumstances which show that he is disinterested, *Treble's case* 1040

11 The validity of the objection to the incompetency of a witness on the ground of *interest*, depends on the *sort of interest* he possesses in answering the question, or in the event of the trial, *Russel's case* ...9

12 The examination of an accomplice taken in writing before a magistrate, pursuant to the statutes of Philip and Mary, may be read in evidence, on proving that the accomplice is dead, *Westbeer's case* 12

13 But if the magistrate be also dead, his signature to the examinations must be proved as well as the death of the examinant, *England's case*, 771, *text.*

14 The *muster-book* of the Navy-Office is admissible evidence on an indictment for forging a *seaman's will*, to prove the fact of the seaman having been on board the ship, and that he is dead, *Lee's case*.....20

15 But it must be previously authenticated by the clerk who signed the entry, *Rhodes's case* 24

16 So the book called *The Assignation Book* in the Prerogative Court, in which all causes are entered by the registrar, and kept officially by the witness, as the only record of the proceedings and decrees of the Court, may be given in evidence to prove that a probate had been revoked, *Ramsbottom's case, 26, notis.*.

17 On an indictment for forging a seaman's will in which the prisoner was the executor, an executor named in a subsequent will by the same testator to that which is charged to be forged, is not a competent witness to prove the forgery, for he claims an interest as executor under the last will, and therefore his testimony, by proving the first will forged, tends to confirm his own, by which he claims an interest as executor. *Sed quære*, for his will being *the last will*, must necessarily in law supersede the former will whether it be good or bad, *Rhodes's case* 24

18 One witness is sufficient in all cases of HIGH TREASON, where a conviction does not work corruption of blood, *Gahagan's case* 42

19 Evidence that the prisoner could

not obtain the goods he is charged with having stolen, otherwise than by the privity, *consent* or *delivery* of the prosecutor's wife, is a good defence against the charge of *his* having stolen them, *Harrison's case*, 47

20 If a banker pay a forged draft, and after *debiting* the account of the person whose name is forged, gives him *credit* for it as a usury, the supposed drawer is an admissible witness on an indictment to prove the forgery, without a release from the banker, for under such circumstances it is perfectly immaterial to the drawer, whether the prisoner is convicted or acquitted, *Usher's case* 48

21 On an indictment for perjury in an answer in Chancery, it is presumptive proof of *identity* if the name subscribed to the answer be proved to be the hand-writing of the defendant, and that the *jurat* was subscribed by the Master as being sworn before him, for the rule of Court "that all defendants shall *sign* their answers," was intended to facilitate the proof of perjury, and sufficient to put the defendant to prove that he was personated, *Morris's case* 50

22 But in perjury under the statute 31 Geo. II. c. 10. for taking a *false oath* to procure letters of administration to a seaman's effects, it has been said that the prisoner must be proved to be *the same person* who signed the warrant and took the oath; but in this case though it was proved by the witness to the *jurat* that a person of the *same name* signed the warrant, it was not proved that the signature was the *hand-writing* of the prisoner, *Thomas Brady's case* 327

23 A *Muhomedan* may be sworn on the *Alcoran*, and give evidence on a criminal prosecution in the manner and form, &c. which the religion of *Mahomet* requires, *Morgan's case* 54

24 The King's *sign manual* to a pardon may be given in evidence on an indictment for returning from transportation, to prove that the convict was not at large without legal cause, *Max. Miller's case*, 74

25 The King's *sign manual* to a convict, will not restore his competency as a witness; it must be by *a pardon* under the Great Seal, for though a sign manual promising a pardon on condition that such conviet give security, and appear and plead, the next general pardon is sufficient authority to discharge him, his competency is not restored until he plead such pardon *sub pede sigilli*, *Gully's case* 98

26 An indictment for stealing *a cow* is not proved by evidence that the animal stolen was *a heifer*, for the statutes 14 Geo. II. c. 6. and 15 Geo. II. c. 34. mention both cow and heifer, the one must have been used in contradistinction to the other, *R. Cooke's case*.....105

27 Evidence in all cases, both criminal and civil, must be *upon oath*; and therefore the *information* of an infant on an indictment for rape, cannot be received unless she is found competent to take an oath and is sworn, *Powell's case*.....110

28 An infant under seven years of age may be sworn as a witness, if she appear to understand the nature of an oath, for no parol testimony can be received except upon oath, *Brasier's case* 199

29 And if the witness is ignorant of the obligation of an oath, the trial may under circumstances be postponed, until she, by proper instruction, become quite sensible of the obligation she is under by being sworn, *White's case* .....430, *notis.*

30 *A wife* may give evidence against

a *prisoner*, although she entertain a hope that his conviction will tend to procure the pardon of her convicted husband; it is an influence which only affects her *credit*, and not her *competency*, *Mrs. Perreau's case* 127

31 If a witness be rendered competent, by receiving *a release*, yet if he declare that he believes, that under the circumstances of the case the releasor will consent to destroy it, his testimony shall be rejected .....*ibid*, 130

32 The delivery of a threatening letter *to a third person*, to forward to the party the object of it, is, although *sealed* at the time of delivery, *evidence* that the deliverer *knew* its contents, *Girdwood's case*, 142

33 A sentence of *jactitation* is not conclusive evidence on an indictment for bigamy, *Duchess of Kingston's case*.....146

34 The supposed drawer of a forged promissory note, *unindorsed*, and not payable *to order*, having received a general release from *the holder*, is a competent witness to prove the forgery, *Akehurst's case*, 150

35 The *nisi prius* record in which the names of the two Judges of Assize are inserted, is good evidence to prove the cause in which perjury is alleged, although the indictment state that the oath was taken before one of the Judges only, *Alford's case* 150

36 An accomplice is a competent witness before the Grand Jury, though not previously admitted a witness for the Crown, and carried surreptitiously before them, *Dr. Dodd's case*.....155

37 On an indictment against an apprentice for fraudulently inlisting himself as a soldier without the consent of his master, and thereby deceitfully obtaining, &c. the indentures *must* be proved by the subscribing witnesses, *Joseph Jones's case* 174

38 To bring an offender within the penalties of SIR JOHN COVENTRY'S ACT, evidence must be given not only of a *malicious intention* to maim, but of a *lying in wait* to effect it, *Tickner's case* 187

39 Parole testimony given before a magistrate whether for felony or misdemeanor, cannot be received on the trial of the prisoner, unless it be previously proved that the information was *not* reduced into writing, for by the statutes of *Philip and Mary*, it is the duty of magistrates to take all charges *in writing*, and Courts will presume it to have been so, unless the contrary be proved, *Fearshire's case* ...202

40 The *drawee* of a bill of exchange, is not a competent witness to prove the *indorsement* a forgery, without a release from the *indorsee*, *John Taylor's case* 214

41 To utter a *forged order* for the payment of money under a *false insinuation* of being the drawer of it, is evidence of knowing it to be forged, *John Sheppard's case*,.226

42 In forgery an unstamped bill of exchange may be given in evidence, though the 23 Geo. III. c. 49. says that no unstamped bill shall be available or given in evidence in any Court, &c. *Rex* v. *Hawkeswood*.257

43 For the stamp is not any part of the instrument; it is merely a mark impressed on the paper to denote the payment of a duty; and is merely collateral to the instrument itself, *Colin Reculist's case*.....703

44 And the stamp acts being merely revenue laws, do not mean to make any alteration in the crime of for-

gery, but only to prove that the unstamped instrument shall not be available for the purpose of recovering on it in a court of justice, and not to prevent its being given in evidence for collateral purposes, *Rex* v. *Moreton* ..... 258, *notis.*

45 Confession obtained by *promises* or *threats* cannot be given in evidence; but any *facts*, though resulting from such inadmissible confession, may be received, *Warickshall's case* 263

46 But no part of the confession can in any way be coupled with the facts thus received in evidence, *D. Moxey's case* .....265, *notis.*

47 Except that particular part of the confession which immediately relates to *the fact* thereby discovered, *Butcher's case* .....265, *notis.*

48 On a charge of stealing from the dwelling-house to the amount of *forty shillings*, it must be in evidence that the prisoner took goods to that amount at one and the same time, *Petrie's case*.....294

49 Parole testimony may be given on an indictment for forging a bill of exchange, though *the bill* itself is in existence; for the possession of *the holder* is, constructively, the possession of *the prisoner*, and he is not bound to produce it against himself, *Aickles's case*.....296

50 Copies of written documents may be given in evidence, if the originals be in the hands of the parties, and they refuse on notice to produce them, *Le Marchand's case*, 300, *notis.*

51 An attested copy of a letter directed to a prisoner, containing *a challenge*, may be given in evidence on the trial for *murder*, if proof be given that the original reached his hands, *Cosmo Gordon's case*.....300, *notis.*

52 There is no distinction, as to the law of evidence, between *civil actions* and *criminal prosecutions*. 300, *notis.*

53 In penal actions *a notice* to produce papers in evidence may be served on the *agent* or *attorney* of the defendant, *Cales* v. *Winter*, 301, *notis.*

54 Three prisoners, on a charge of highway robbery, made a full confession of their guilt before the committing magistrate, and one of them was admitted a witness for the crown; but no written examination of the witness, or confession of the prisoners, was returned, and no evidence being given that they were *not taken in writing*, oral testimony of what they had said was rejected, *Rex* v. *Jacobs*.....309

55 A cashier who signs notes "FOR *the Governor and Company of the Bank of England*," is competent in forgery to prove that his name is not his hand-writing; for he is not directly and immediately interested, *Newland's case*.....311

56 The signature of the cashier's name may be disproved by any other person who is acquainted with the character of his handwriting, *Hughes's case*...311, *notis.*

57 And if it have been proved that the instrument is false in every part, as in the texture of the paper, the water-mark, the engraving, the ink, and the date, it is not necessary to disprove his signature, *M'Guire's case*, 311, *notis.*

58 Persons intitled to any parliamentary reward are *competent witnesses*; notwithstanding they are, in this respect, interested in the conviction of prisoners, *The Rioters' case*.....314, *notis.*

59 *The payee*, if the bill never reach his hand, and he has no demand on the drawer, is a competent witness to prove that his name indorsed thereon is not his handwriting, *Sponsonby's case* 332

60 But *the drawer* being the only *witness* who can prove the *identity of the payee, a letter* of advice from him to the payee, signifying that he had drawn such a bill, is not the best evidence of that fact, *Sponsonby's case* 332

61 And therefore the supposed *payee*, until his *identity* be legally proved, is not a competent witness.....*ibid.*

62 An attainted convict cannot be a witness, and therefore his declaration at the moment of execution cannot be given in evidence as the declaration of *a dying man, George Drummond's case* 337

63 To support the capital part of a charge on the statute of 12 Anne, c. 7. it must be proved that the larceny was not committed in the prisoner's own house, *Thompson* and *Macdaniel's case* 338

64 Persons acting in the character of excise-officers, or constables, shall be taken to be excise-officers and constables until the contrary appear, *Shelley's case* .....340, *notis.*

65 On an indictment for obstructing custom-house-officers in the execution of their duty, reasonable evidence must be given that the goods they were about to seize were uncustomed goods ..... *ibid.*

66 An immaterial fact, if averred, must be proved as laid; as where an indictment for maliciously shooting laid it to be in the house of *James Brewer* and *John Sandy*, but it was in the house of *John Brewer* and *James Sandy, Count Durore's case*, 351

67 A prisoner may be convicted on the evidence of his *own confession*, although the facts of that confession stand single and uncorroborated by any other evidence, *A. Fisher's case*.....311, *notis.*

68 A counterfeit shilling produced in evidence, although it is quite smooth, and no impression of any sort discernible upon it, will support an indictment for counterfeiting to the similitude of the legal coin, *J. and P. Welch's case*, 364

69 A person to whom stolen goods have been sold, although he be discovered in consequence of an extorted confession made by the principal felon, is a competent witness to prove his buying the goods of the prisoner, *Lockhart's case* 386

70 The *daily book* of a public prison is good evidence to shew the time of a prisoner's discharge; for it is the record of a public officer, whose acts the law presumes to be true until the contrary be shewn, *Aickles' case* 392

71 The books of a corporation, heralds' books, minutes of a visitation, the rolls of a court-baron, parish-registers, and every book which is of a *public nature*, may be given in evidence.....393, *notis.*

72 So the *assignation book* of the Prerogative Court is evidence, *Ramsbottom's case* .....26, *notis.*

73 A witness, though *deaf* and *dumb*, may be sworn, and give his evidence on an indictment for felony, if intelligence can be conveyed to and received from him by means of signs and tokens, *J. Ruston's case* 408

74 A *Scotch covenanter* may give evidence in *a criminal prosecution* on being sworn according to the custom of his *sect*, without kiss-

ing the book, *David Mildrone's case* 412

75 The ceremony is by holding up the hand without kissing the book, and repeating an oath, the words of which are peculiar to the sect, *Walker's case* 498

76 An indictment on 13 Geo. III. c. 56. for removing the stamps on plate, *to wit*, the King's head and the *lion rampant*, is not proved, if, on producing the plate, the stamp appear to be a *lion passant*, *C. Lee's case*.....416

77 On an indictment for a *misdemeanor* under the 22 Geo. III. c. 58. for receiving stolen goods, the *principal felon* is a competent witness against the *accessory*, *Haslam's case*..... 418

78 The non-delivery of a hired chaise, and the disappearance of the hirer, although the hiring was for an indefinite length of time, is evidence of a tortious conversion, *M. Semple's case*.....420

79 A person who has no notion of *eternity*, or of a future state of rewards and punishments, cannot be *sworn*, and therefore cannot be examined as a witness, *White's case*, 430

80 But the trial may be put off, and the party instructed ... 430, *notis.*

81 On an indictment for forging a letter of attorney whereby the prisoner transferred stock, the proprietor of the stock cannot be a witness to prove that his name is not his hand-writing, *Heysham's case* ..... 438, *notis.*

82 A conviction for *a conspiracy*, or *barratry*, or for any offence comprehended under the denomination of *crimen falsi*, disqualifies the convict to be a witness; for it is the *infamy*, and not the *punishment*, that works the disability, *Priddle's case*, 442

83 A person convicted of *petty larceny* could not, at common law, be witness, *Mackinder's case*, 443, *notis.*

84 But now, by 31 Geo. 3. c. 35. no person shall be an incompetent witness by reason of a conviction for petty larceny.....443

85 The pardon of a convict on the 31 Geo. II. c. 10. for taking a *false oath* to obtain probate of a seaman's will, renders him a competent witness against the person who suborned him; for by the allowance of the pardon his disability is removed, *T. Reilley's case*.....454

86 The testimony of an accomplice, *though totally uncorroborated*, is sufficient to warrant a conviction, if believed by the Jury, *Atwood's case*.....464

87 The Court generally do *not call* upon a prisoner to defend himself against the single uncorroborated testimony of *an accomplice;* but this is rather a matter of *discretion with the Court* than a *rule of law*, *Durham's case*.....478

88 For no doubt can be entertained but that a prisoner may be convicted upon the single and uncorroborated testimony of an accomplice, if the Jury believe him, *Atwood's case* 464

89 On an indictment of murder, an information given on oath by the deceased, *in the presence of the prisoner*, may be given in evidence, though the informant was not apprehensive of death, and though the information be signed by one magistrate only, *Radburn's case*, 457

90 In murder, the *dying declarations* of the deceased, after the mortal wound is given, may be received in evidence, although the party did not *express* any apprehension of approaching dissolution, if *the*

Jury [sed vide *John's case, infra*] think that from the circumstances of the case she must have felt such an apprehension, *Woodcock's case*, 500

91 But although the medical attendant of the dying person tell her in such terms as seem to make her sensible of her immediately impending dissolution, yet if, from the cessation of pain, as where mortification has taken place, and greatly advanced, the patient, in fact, believes that she is getting better, from the pain having ceased, her dying declaration cannot be received, *Wellborn's case*, 503, *notis.*

92 But it is not necessary that *the fact* of the deceased having been sensible of impending dissolution should be determined by *the Jury*; it is *for the Court* to determine whether the deceased was or was not under that impression at the time the declaration was made, *John's case* ..... 504, *notis.*

93 On a trial for murder, an examination of the party wounded taken by a magistrate at an infirmary, *but not in the presence of the prisoner*, cannot be read in evidence as an examination taken pursuant to the statutes of Philip and Mary; but if the examinant appeared conscious that his death was inevitable, it may be read as a dying declaration, *Dingler's case*, 561

94 For such an examination is *extra-judicial*, not being taken as the statutes of Philip and Mary direct; and therefore cannot be received in evidence, *Woodcock's case*, 500

95 A Grand Jury cannot receive the examination taken before a magistrate on a charge of felony, but must hear the deponent's *vivâ voce* testimony, although there be reason to suspect that he has been tampered with by the indictee, *Denby's case* 514

96 On an indictment for the murder of *a constable* in the execution of his office, it is not necessary to produce his appointment; for it is sufficient if it be proved that he was *known to act as constable*, *The Gordons' case* 515

97 A person indicted as an *accessary before the fact* cannot be convicted of that charge on evidence which proves him to be guilty as *a principal* in the offence, *Winifred Gordon's case*.....515

98 A voluntary confession of felony made by a prisoner before a magistrate, and reduced into writing, may be given in evidence, though the magistrate has neglected, and the prisoner refused, to sign it, *Lamb's case*.....552

99 Minutes taken by the solicitor for a prosecution, on the examination of a prisoner before a magistrate, may be read in evidence at the trial, though not signed either by the prisoner or the magistrate, *Thomas's case* 637

100 But a prisoner may, previous to his signing his examination, retract what he has said, *Bennet's case* ..... 553, *notis.*

101 A confession made under the hope of being admitted a witness for the Crown, is not a voluntary confession, *Hall's case*...559, *notis.*

102 On the trial of an indictment for murder, *the death* of the person charged to have been killed may be collected from the circumstances, if incapable of being proved by other evidence, *Hindmarsh's case*, 569

103 Immaterial averments in an indictment need not be proved, *Holt's case* 593

104 The Gazette, purporting to be printed by the King's printer, is good evidence of all acts of state therein contained ..... *ibid.*

105 On an indictment for *robbing the mail*, it must, at common law, be proved that the *robbery* was committed in *the county* laid in the indictment, *Thomas's case*.....634

106 But by the statute 42 Geo. III. c. 81. s. 3. the offence of robbing the mail, created by 7 Geo. III. c. 50. may be tried in any county of *England* in which the offence was committed, or the prisoner apprehended, *ibid*..... 637

107 If a prisoner be charged with burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove a larceny on a prior day, *Vandercomb* and *Abbott's case*.....708

108 On an indictment for *forging* a scrip receipt, it must appear to have been signed subsequent to the statute on which the indictment is founded, *Reeves's case* 808

109 On an indictment for forging a Bank-note, a letter, purporting to come from the prisoner's brother, and left by the post-man, pursuant to its direction, at the prisoner's lodging after he was apprehended and during his confinement, cannot be read in evidence against him on the trial, *B. Huet's case*, 820

110 So also letters directed to a prisoner, which are stopped *in transitu* at the post-office, and never delivered to him, are not evidence against him, *Hevey's case* 235

111 A person who has been convicted of coining halfpence, cannot be a witness until it be proved that he has suffered the sentence of the law, *Collins's case* 827

112 In rape, *the deposition* of the girl taken before the committing magistrate, and *signed by him*, may, *after her death*, be read in evidence at the trial of the prisoner, although it was *not signed by her*, and she was under twelve years of age, provided she was *sworn*, and appeared competent to take *an oath*: and all the facts necessary to complete the crime may be collected from her testimony so given in evidence, *Flemming* and *Windham's case* 854

EXAMINATIONS.

1 By 1 and 2 Philip and Mary, c. 13. s. 4. and 2 and 3 Philip and Mary, c. 10. Justices of peace, on a charge of felony, *shall take the examination* of the prisoner and the *information* of the witnesses, and *shall put* so much thereof as is necessary to prove the felony *into writing*, and certify the same to the next gaol delivery 310

2 Parole evidence, therefore, cannot be received at the trial of what has passed on the examination, *unless* it be shewn that it was not reduced into writing, *Fearshire's case*, 202

3 For it shall be intended that the magistrate has done his duty, unless the contrary appear, *Jacob's case* 309

4 Therefore, if no examination in writing be returned, no parole testimony of what passed thereon can be received, *Hinxman's case*, 310, *notis.*

5 But if reduced into writing, it may be given in evidence, though the magistrate has neglected, and the prisoner has refused, to *sign it*, *Lamb's case*.....582

6 So if what passes at the examination has been taken by way of *minutes* by the solicitor for the prosecution, such minutes may be

read in evidence, though not signed by the magistrate or the prisoner, *Thomas's case*.....637

7 But a prisoner may, previous to his signing his examination, retract what he had said, *Bennett's case*, 553, *notis.*

8 The information of a girl under twelve years of age, taken in writing, on the examination of a prisoner for rape, may be read in evidence *after her death*, though not *signed* by her, *Flemming's case* 854

9 Same point in petty treason, though the information was only signed by a magistrate, *Radbourne's case*..458

10 But an examination taken by a magistrate at an infirmary to which the prosecutor had been taken, cannot be read; for it is extra-judicially taken, and not in the presence of the prisoner, *Dingler's case* 561

EXCHEQUER BILLS.

1 If an indictment charge the prisoner with having embezzled "certain bills, commonly called *exchequer bills*," and it appears that the person who signed them on the part of government was not legally authorized so to do, the indictment is bad; for they are not the things they are averred to be, *Aslett's case*, 954

2 But, even in this defective state, they are *securities* and *effects*, the embezzling of which by a bank clerk, is a capital felony, within 15 Geo. II. c. 13. s. 12. *Aslett's case*, 958

EXECUTION.

1 The bodies of executed murderers were, by the common law, at the King's disposal, and therefore the Court could not direct them to be hung in chains; but by 25 Geo. II. c. 37. the judge may, after sentence pronounced, *order* the body to be hung in chains, *Hall's case*.....21

2 The declarations of a convict at the moment of execution cannot be given in evidence as the declarations of a dying man, *George Drummond's case* 337

F.

FALSE AFFIRMATION.

1 Goods obtained upon a *false affirmation*, as if a person obtain lottery tickets, affirming that he will pay for them on delivery, and give *a draft* upon a banker in whose hands he has no cash, this is not indictable as *a fraud* at *common law*, for it is not a transaction of a *public nature*, nor under the statutes of Hen. VIII. or Geo. II. for the draft is only an *apparent token*, but it is neither a *false token* or a *false pretence*, *Lara's case* 647

2 But it has been since determined that if a person obtain property by giving a draft as on his banker, and pretending that he had cash there to pay it, when he had no cash there, and well knew that it would not be paid, is an indictable offence, *Jackson's case*.....656, *notis.*

FELONY.

1 To receive goods contrary to 2 Geo. III. c. 28. is felony, *Wyer's case*, 480

FETTERS.

1 The Court have no power to order a prisoner's fetters to be taken off until he has pleaded and is brought to the bar, and the jury are charged to try him, *Waite's case* 96

FORGERY.

1 By 2 Geo. II. c. 25. to forge, &c. any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note, indorsement, or assignment, or any acquittance, or receipt, or to utter the same, is a capital offence 231

2 There must be a false making of some of the instruments mentioned in the Act to constitute forgery, *Hevey's case*.....231

3 By 7 Geo. II. c. 22. to forge any acceptance of any bill, or the number or sum of any accountable receipt for any note, bill, or security for money, or any order for money or goods, or to utter the same, &c. is a capital offence...180

4 A forged *receipt*, signed to a *cash memorandum*, of various kinds, is not of itself a receipt within the meaning of the statute of 2 Geo. II. c. 25, *Russell's case*.....8

5 Forging a seaman's will, is complete, although the signature be in a wrong *christian* name, *Fitzgerald* and *Lee's case*.....20

6 A forged order for the re-delivery of plate delivered by a silversmith to the Goldsmiths' Company, for the purpose of being marked pursuant to the directions of the 13 Geo. III. c. 26. is a capital offence within the statute of 12 Geo. II. c. 26. *Jones's case*.....53

7 A forged order, "Please to deliver "*my work*," purporting to be the order of a silversmith to the *assay-master* of the Goldsmiths' Company for the re-delivery of plate, is a compulsory order for the delivery of goods, although it be not directed to any person by name, for it is the usual form of the trade, *John Jones's case*.....53

8 But if an order for goods purport to be signed by a person not the owner, it must be averred that such person had authority to make such order, *Clinch's case*.....540

9 If *A.* borrow money *on his personal credit* from *B.* and give to *B.* his note of hand for it, in a fictitious name, this is not forgery, for the credit in such case is given to the party himself without regard to the name, *Dunn's case*.....57

10 But if *A.* pretending to be *the executrix of C.* receive money from *B.* on account of her supposed testator, and give a note for it in a fictitious name as *the executrix of C.* this is a forgery, although she sign the note by making *her mark*, for the instrument is in this case false in itself, *E. Dunn's case*.....57

11 If a bill of exchange, payable to *A.* get into the hands of another person of the same name with *the payee*, and *he* indorse it fraudulently it is forgery, though the indorsement be his own name, *Mead* v. *Young*.....786

12 So uttering a note, as *the note of another*, though made in the prisoner's *own name* is within the statutes against forgery, *Parke's and Brown's case*.....775

13 So an order made by a seaman on his agent "*to pay all his proportion of prize-money, &c.*" is an order for payment of money within 7 Geo. II. c. 22. the forging of which is felony, though drawn under circumstances which, if genuine, would have made it void under 32 Geo. III. c. 34. *Mackintosh's case*.....883

14 Forging a paper-writing, purporting to be an *office copy* of the report of the Accountant-General, of money being paid into the Bank, is within the statute 12 Geo. I. c. 32. *Gibson's case*.....61

15 Forging a *Scotch bank-note* is not

within the statute of forgery, 2 Geo. II. c. 25. for that statute expressly excludes *Scotland*, and therefore it cannot apply to a note drawn and made payable only at *Aberdeen*. *Sed qu.* as to the uttering it in *England*, *Dick's case*....68

16 An indictment for forgery averring a *general intent* to defraud is sufficient, without setting out the *particular mode* by which the fraud was intended to be effected, *Robert Powell's case*.....77

17 In an indictment for forging "a "certain paper-writing purporting "to be the last will and testament "of, &c." is a sufficient description of the instrument forged, *Birch and Martin's case*.....79

18 An indictment will lie on a forged indorsement, although the money secured by the bill be paid to the holder of it; for the *intention to defraud* is sufficient to constitute the offence, *ibid.*.....82

19 A forged *draft on a banker* is an *order for the payment of money* within the 7 Geo. II. c. 11. although no person of the name forged ever kept cash there, *Locket's case*.....94

20 The sort of *order* for payment of money, or delivery of goods, which is within the statutes of forgery defined.....95, *notis.*

21 To forge an instrument purporting to be the *last will* of another, is a capital offence within the 7 Geo. II. c. 22. although the person whose will is forged be alive, *Sterling's case*.....99

22 For a testator's will exists while he is alive, though it do not take effect until after his death, *Coogan's death*.....449

23 And to constitute forgery it is not necessary that the instrument charged to be forged should be such as would be effectual if it were a true and genuine instrument, *Reculist's case*.....703

24 Therefore if a person alter his own name indorsed on a bill of exchange to the name of a person beginning with the same initial, it is forgery, although there is no known person in existence answering to the name forged, *Bolland's case*.....83

25 So forging a power of attorney to receive a seaman's wages in the name of a supposed child, administratrix of such seaman who died childless, is within 2 Geo. II. c. 25. notwithstanding the deed was impossible to be true, *Lewis's case*, 451

26 To forge an order for goods in terms which import rather *a request* than *a command* to have them delivered, is not an order for the delivery of goods within 7 Geo. II. c. 22. for the terms of the order must assume a right over the goods intended to be procured, *George William's case*.....114

27 The supposed *drawee* of a promissory note, unindorsed and not payable to order, having received a general release from *the holder*, is a competent witness to prove the FORGERY, *Akehurst's case*...150

28 To indorse a bill in a *fictitious name* is FORGERY, although the money might have been as well obtained by indorsing it in the *real name* of the person who uttered it, *Tuft's case*.....172

29 A note fabricated in imitation of a bank-note, although there be no *water-mark*, and the word *pounds* be omitted, is of sufficient similitude to constitute forgery, being such as may

impose on those to whom it may be tendered, *Elliott's case* 175

30 So also, " I promise to pay E. H. " or order, Three—thirteen shil- " lings," *Dunn's case*.....57

31 An entry of the receipt of money or notes made by a Cashier of the Bank of England, in the BANK-BOOK of a creditor, is an accountable receipt for the payment of money within 7 Geo. II. c. 22.; and altering the principal sum, by prefixing a figure to increase its numeration, is a capital FORGERY, *Harrison's case* 180

32 In an indictment for forgery, the words " *purporting* to be a bank- " note," mean that the instrument *upon the face of it* appears to be a bank-note; and the want of such appearance cannot be supplied by the representation of the party uttering it, *William Jones's case* 204

33 For though, in forgery, there need not be an exact resemblance, similarity to a common intent being sufficient; yet the false instrument must, in all essential parts of it, be so like the true one, as to have an aptness to deceive, *Elliott's case*, 179

34 And therefore, where a note, intended to pass as a bank-note, was, " I promise to pay, &c." " For Self " and Co. of MY Bank in England," without any signature, was held not to have sufficient similitude to a bank-note, *Jones's case* 204

35 But if a forged medicine-stamp has not the counterpart of the genuine stamp, but is similar to it in all the other parts which are exposed to view, and so like as to have an aptness to impose on persons in general, this is sufficient resemblance, *Collicott's case* 1048

36 So a counterfeit bank-note, without any water-mark or sum in the body of it, with the sum in white letters in the corner of it, is sufficient, *Elliott's case*..... 179

37 Giving to the drawer of a bill of exchange, *a receipt* in a false name, as for the prisoner's own name, " for the contents of the bill," which was endorsed in blank, is *forgery*, although no additional credit was thereby gained to the prisoner; it being done fraudulently, and to escape detection, *John Taylor's case*..... 214

38 It is no answer to a charge of *forgery* to say, that there was no *special intent* to defraud any *particular person*; because a *general intent* to defraud is sufficient to constitute the crime, &c., *Tatlock* v. *Harris*, 216, *notis*.

39 For it is not the injury done to any particular individual, but the intent to do a possible injury, that constitutes the *gist* of this offence, *Holden's case*..... 1019

40 Uttering a forged order for payment of money under a *false representation*, is evidence of knowing it to be forged, *Sheppard's case*...226

41 In an indictment for forgery, a description to a common intent of the person or persons intended to be defrauded is sufficient, *H. Lovell's case* 248

42 In forgery, the forged instrument may be given in evidence, although not stamped pursuant to the 23 Geo. III. c. 49, *Rex* v. *Hawkeswood*, 257

Same point, *Reculist's case*.....703

Same point, *Morton's case*.....258

43 A Cashier of the Bank may prove that his name subscribed to a bank-

note is forged; for he does not sign it for himself, but " for the Governor of the Bank," *Newland's case*, 311

44 By 23 Geo. III. c. 49. s. 20. imposing a duty on receipts, it is made felony to forge or counterfeit *the stamp* denoting the payment of the said duty.....352

45 All paper upon the face of which there is *a mark* resembling *the stamp* required by the 23 Geo. III. c. 49. imposing a duty on receipts, shall be considered as paper liable to the duties, *Holland Palmer's case*, 352

46 Forgery, with intent to defraud "*the Stewards of the feast of the Sons* " *of the Clergy*," is within the statutes which make forgery a capital offence, although this is to the injury of a *private society*, and those statutes apply only to the defrauding of *individuals* and *corporate bodies*, *Jones and Palmer's case*...366

47 So if a person employed by the executors of a *public accountant* to settle the accounts of the testator with Government, procure fabricated vouchers, and deliver them to *the Navy-Office*, in order to exonerate the estates of the testator from an extent, it is a forging and uttering receipts within 2 Geo. II. c. 25, *Thomas's case* 877

48 A bill of exchange drawn for *less than the sum* and not in *the form* required by the statute 17 Geo. III. c. 30. cannot be the subject of a capital forgery, *Rex* v. *Moffatt*, 431

49 A person who has been long known by an assumed name, and who afterwards, for the purposes of concealment, takes his real name, and in his *real name* draws a bill of exchange, is not guilty of forgery, although the bill was drawn and uttered for the purposes of fraud, the bill not being due when the prisoner was tried, *Rex* v. *Aickles*..... 438

50 So where a soldier was induced by another to sign his *own name* to a fabricated country bank-note, though done knowingly, and for the purpose of fraud, was held no forgery, *Woodward's case* ..... 783, *cited.*

51 But uttering a note as the note of *another person*, though made in the prisoner's *own name*, is within the statutes against forgery, *Brown's case*..... ... 775

52 But where one merely assumes to be *the person* of a *real indorser*, that assumption, though made for a fraudulent intent, will not make the case forgery; for there is no false making, *Hevey's case*.....229

53 A forged order for the delivery of goods is not within the 7 Geo. II. c. 22. unless it be *directed* to the person who holds the goods, *Clinch's case*..... 540

54 It must appear in an indictment for forging an order for the delivery of goods, that the person whose name purports to be forged to it, had an authority to make such an order as the forged order purports to be; and therefore if it appear that he was *servant* of the owner, it must be alleged that he, as such servant, had *authority* to make such order, *Clinch's case*.....540

55 An indictment for forging a bill of exchange, stating that it *purported* to be directed to *John King*, by the name and description of *John Ring*, is bad, *Reading's case*.... 590

56 In an indictment for forgery, the instrument charged to be forged must be set out, that the Court may see whether it is an instrument within the statutes against this offence, *Lyon's case*.....597

57 The name of the holder of a Navy-bill, signed on a proper receipt-

stamp, and affixed to the Navy-bill, does not of itself purport to be a receipt for money within the statutes 2 Geo. II. c. 25. and 7 Geo. II. c. 22.; but as the money is paid on such signature, and it has always been considered a receipt at the Navy-Office, it may, *by proper averments*, be brought within the above statutes, as *a receipt for money, Hunter's case* 624

58 And on the authority of *Hunter's case*, an indictment for forging the word "*settled*", at the bottom of a bill of parcels, importing that the bill had been paid, was held bad, because it did not shew, by proper averments, that the word "*settled*" purported to be *a receipt;* though the Stamp-Act, 35 Geo. III. c. 55. s. 7. enacts, that every writing or memorandum denoting that any debt has been paid or *settled* shall be deemed and taken to be *a receipt, Thompson's case*.....910, 911

59 But an indictment for forging *a receipt*, viz. "Received the contents above (£1 4s. 0d.), by me, *Stephen Withers*," was held good, without setting out *the account* to which it referred, or making any averment, *Testick's case*.....632, *notis.*

60 So forging a receipt for £20. due upon a bill of exchange, *viz.* "Received, W. Wilson," the indictment which set forth *the bill*, and averred the forgery to be *a receipt* for the said sum, without averring that the *writing forged* together with *the bill* purported to be, or was, *a receipt*, was held good, *Taylor's case*, 215

61 An indictment for forging a bill of exchange, directed to Ransom, Moreland and Hammersley, stating that it purported to be directed to Kinnaird, Moreland and Hammersley, by the names and description of Ransom, Moreland and Hammersley, is bad; for the *purport* and the *tenor* are repugnant, *Gilchrist's case* 657

62 So an indictment for forging a scrip receipt, signed "*C. Olier*," stating that it purported to be signed by *Christopher Olier*, is bad, *Reeves's case*.....808

63 An indictment for forging a *transfer* of stock is good, although the stock had never been *accepted* by the person in whose name it stood, and although the transfer was not *witnessed* according to the rules and directions of the Bank, *Gade's case*, 732

64 If a person authorize another to sign a note in his name, dated at a *particular place*, and made payable at a *banker's*, and the person in whose name it is drawn represent it to be the name of *another person*, with intent to defraud, and no such person as the note and the representation import, exist, this is forgery, *Parkes's case*.....775

FRAUD.

1 A fraud to be indictable at *common law*, must be such as affects the public, as selling by false weights or false measures, or which is effected by some false public token, or by conspiracy, *Wheatley's case*, 489, *notis.*

2 Fraud consists in obtaining valuable property from the possession of another, with his consent, by means of false pretences, or some other artful device, against the subtlety of which, common prudence and caution are not sufficient safeguards, *Bazeley's case*.....835

3 By 33 Hen. VIII. c. 1. to obtain money, goods, chattels, jewels, or other things, by means of any false privy token, or counterfeit letter, in any other person's name, is punishable by imprisonment, pillory, or

other corporal punishment short of death, *Mason's case*.....492, 506

4 A check on a banker, given by a person who knows it will not be paid, is a *false token* within this statute, *Jackson's case*...656, *notis.*

5 By 30 Geo. II. c. 24. to obtain money, goods, wares or merchandises, with intent to cheat and defraud, by any false pretence or pretences, is punishable by fine, imprisonment, whipping, or transportation, *Mason's case*.....487

6 By 52 Geo. III. c. 64. the 30 Geo. II. c. 24. is extended to any bond, bill of exchange, bank-note, promissory note, or other security for payment of money, or any warrant or order for payment of money, or delivery or transfer of goods or other valuable thing.....487, *notis.*

7 The above statutes are confined to cases where goods are obtained in *other men's names*, either by *false tokens*, or by *counterfeit letters*, or by *false pretences*, but do not extend to cases where a man gets goods on his *own account*, with an intention to *steal* them...499, *notis.*

8 To constitute *fraud*, the *property* obtained, whether by means of a false token or a false pretence, must be *parted with absolutely* by the owner, for if the *possession* only be parted with, and that possession be obtained by fraud, &c. it will be *felony*.....1066

9 Therefore, when *Atkinson* sent *Dale* with a letter written in the name of *Broad*, without his authority, to one *Dunn*, soliciting the loan of £3 for a few days, and *Dunn* sent the money in a letter to *Broad*, which *Dale* delivered to *Atkinson*; it was held that this was *fraud*, and not *felony*, for *Dunn* believing the request to have been made by his friend *Broad*, had parted with the *property*, and not with the *possession* only, *Atkinson's case*.....1066, *notis.*

Same point, *Nicholson's case*.....610

10 An indictment for *a fraud* in obtaining money under false pretences, must set out the false pretences, *Rex* v. *Mason*.....487

11 But if the false pretences be stated, and the *truth of them negatived*, it is sufficient, though it is not averred that the offender *falsely* pretended, *Airey's case*...493, *notis.*

12 *Qu.* Whether on the finding of a jury, that a person *unlawfully* obtained and converted the goods of a tradesman, under a *false pretence* of being sent for them by a customer, the offence be *fraud* or *felony*, *Cockwaine's case*.....498

13 On 30 Geo. II. c. 24. there must be an obtaining by *a false pretence*, with an *intention to defraud*; but the pretence may relate to a *future transaction*; and if made by *one* in the presence of and in *concert* with others, they may all be included *jointly* in the same indictment, *Young's case*.....505

14 To utter a forged note, appearing like, but different from a bank-note, under a *false representation* of its being a good bank-note, is a fraud, and not a forgery, *Jones's case*.....204

15 An indictment for a fraud at common law, charging the *false pretence* to have been made on one person, and *the deceit* to have been practised on another, is bad, *Lara's case*.....647

16 A person who, under a mere *false affirmation*, bargains with the holder of lottery tickets, and obtains the delivery of them by giving *a draft on a banker*, with whom he had no cash, for the amount of them, is not indictable for a fraud at common law; for, in order to consti-

tute this offence, the property must be obtained either by *conspiracy* or by means of a *false token*, or a *false pretence*, and not, as in this case, by a mere *false assertion*, or bare *naked lie*, *Lara's case*.....647

17 But it has been since determined to be an indictable offence, to obtain goods by giving a check on a banker, with whom the drawer has neither cash nor credit, *Jackson's case*.....656, *notis.*

FREEHOLD.

1 Property affixed to the freehold is not at common law the subject of larceny, if severed and carried away at the same time.....319

2 But to remedy this inconvenience, the 4 Geo. 2. c. 32. makes it felony to steal, rip, cut, or break, with intent to steal, any lead, iron bar, iron grate, iron pallisadoes, or iron rail, fixed to any dwelling-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereto belonging, or to any building whatsoever, or fixed to any garden, orchard, court-yard, or outlet belonging to any dwelling-house or other building.....319

3 By 21 Geo. 3. c. 68. to steal, rip, cut, break or remove, with intent to steal, any copper, brass, bell-metal, utensil or fixture, fixed to any dwelling-house, out-house, coach-house, stable, &c. or fixed in any garden, &c. is punishable by transportation, 593

4 Writings concerning *the realty* (as a commission to settle the boundaries of *a manor*) are constructively adherent to the *freehold*, and therefore cannot be the subject of larceny at common law, though perhaps the offender may be indictable under 8 Hen. VI. c. 12. s. 3. and therefore may be a subject of larceny, *Westbeer's case*.....12

5 The sashes of windows put into their frames and secured by laths, but neither hung nor beaded, are not fixed to the freehold, *Hedges's case* 201

6 Lead affixed to a church is a fixture to the freehold: for a church is within the words 4 Geo. II. c. 32. " any building whatsoever" 319

7 An indictment on 4 Geo. II. c. 32. for stealing lead affixed to *a church*, need not state in whom the freehold resides, *Hickman and Dyer's case*, 318

8 A *casement* is not a *fixture* to the *freehold* within the statutes of the 4 Geo. II. c. 32. or 21 Geo. III. c. 68. *John Senior's case*.....496

9 Stealing lead from a house of which the offender had fraudulently procured a lease, the more colourably to strip it of its fixtures, is felony within 4 Geo. II. c. 32. as a fixture to the freehold, *Munday's case*...991

G.

GAOL DELIVERY.

1 Justices of gaol delivery have, by the common law, as well as by the express words of the commission, a jurisdiction in high treason, which is confirmed by 1 Edw. VI. c. 7.....158

2 But justices of gaol delivery have no power to *bail*, or to *discharge by proclamation*, a prisoner in custody on a warrant by a secretary of state, for " *high treason* committed at " *Savannah* in the colony of *Geor-* " *gia* in *North America*," *Platt's case* 157

3 For although the commission of gaol delivery is of high antiquity and extensive power, being next in order to the ancient commission of EYRE, and frequently issued during

the intervals of THE ITER, yet by the 1 Edw. VI. c. 7. it appears that the whole scope of it was merely to bring into gaol delivery every prisoner within *the franchise*, so that all offenders within *the county* might have the benefit of *deliverance* 168

4 The commission therefore of gaol delivery extends only to such offences as are committed in the common and ordinary way in the county, *Platt's case*.....169

5 And it is very clear that justices of gaol delivery cannot admit a prisoner to bail, independent of the *habeas corpus* act, for such a power belongs alone to the Court of King's Bench, *Platt's case*.....168

6 But they may admit a prisoner for *high treason* in the county in which they sit, to bail, under the *habeas corpus* act, on his complying with the forms therein stated.....168

GARMENTS.

1 By 6 Geo. 1. c. 23. s. 4. "whoever shall assault another in the public streets, with intent to tear, spoil, cut, burn, or deface, and shall tear, &c. the garments or clothes of such person, shall be guilty of felony," 530

2 To constitute an offence under this statute, the *assault and the injury must be committed at the same time;* and therefore the assault and the injury must be connected in the indictment by the words *then and there*, *Rhenwick Williams's case*, 529

3 There must also appear a *primary intention* to *injure the garments* or clothes of the person; and therefore if the primary intention be to *injure the person*, the offence is not within this statute, although, in carrying that intention into execution, the garments be thereby injured, *Rhenwick Williams's case*.....529

GREAT SEAL.

1 The only Great Seal now in use, is that which was made upon the union with Great Britain and Ireland, *Bullock's case*.....996

2 An indictment against a bankrupt, averring that the commission issued under the Great Seal of Great Britain, is good, although it appears to have issued under the Great Seal of Great Britain AND Ireland; for both descriptions mean the Great Seal of the empire, *Bullock's case*, 996

H.

HABEAS CORPUS.

1 A prisoner committed on *suspicion* of felony, is, by the *habeas corpus act* 31 Car. 2. c. 2., intitled to be bailed, *Gregory's case*.....98, *notis.*

2 A prisoner in custody upon a commitment for high treason in North America, is not intitled to be bailed or discharged under the *habeas corpus act*, on his application to a court of gaol delivery, although no indictment has been preferred within the time mentioned by that statute, *Platt's case*.....157

3 A master cannot sue out a *habeas corpus* to bring up the body of his impressed apprentice, his remedy in such case being by civil action against the aggressor; but the apprentice himself may sue out a *habeas corpus*, *Edwards's case*.....204, *notis.*

HACKNEY COACHMEN.

1 Stealing property accidentally left in a hackney coach is an indictable offence, for the coachman has the *bare care*, and not the *legal posses-*

sion of such property, *Wynne's case*.....413

Same point, *Sears's case*, 415, *notis.*

Same point, *Lamb's case*.....415

HAT DUTY.

See Statutes.

HIGH TREASON.

1 A prisoner committed to Newgate for high treason in North America is triable only in the Court of King's Bench or under a special commission, and therefore cannot be admitted to bail under the *habeas corpus* act by Justices of gaol delivery, or discharged by their proclamation for want of prosecution, *Platt's case*.....157

2 By 1 Edw. VI. c. 7. convicted traitors reprieved may receive judgment by the Justices of any subsequent gaol delivery, *Platt's case*.....159

3 By 35 Hen. VIII. c. 2. treasons committed out of the realm shall be tried in the King's Bench, &c. 159

4 By 33 Hen. VIII. c. 25. suspected traitors convicted by the Privy Council may be tried by commission in any county 161

5 A conviction of high treason may be upon the evidence of one witness in all cases where there is no corruption of blood, *Gahagan's case*, 42

6 On an indictment for high treason, in coining to the similitude of the legal money, it must appear that the counterfeits were in a state fit for circulation, and that the prisoners had the means of making them, *Harris and Minion's case*.....155

7 And therefore to counterfeit the impressions of a half-guinea on a piece of gold, which was previously hammered and not round, nor would pass in the condition it then was, is not high treason, *Rex* v. *Varley* 76

HOMICIDE.

1 If several persons assemble to do an illegal act, and a person totally unconcerned in the matter for which they so assembled be accidentally killed by one of the company, the others shall not be construed as aiding and abetting such homicide, because it did not happen in prosecution of the illegal act for which they assembled, *Rex* v. *Hodgson* 6

2 Homicide occasioned by premeditated negligence and cruel usage by a master to his apprentice, is manslaughter, *Self's case*.....137

3 As by refusing sufficient food, drink, and necessaries to support life, *Wade's case*.....137, *notis.*

4 So if on a sudden quarrel the blow intended for one party fall on another, *Brown's case*.....148

Same point, *Snow's case*.....154

HOUSE.

1 The words *domus mansionalis* do not only include the dwelling-house, but also out-houses that are parcel thereof, as barns, stables, cow-houses, dairy-houses, if they be parcel of the messuage, though they are not under the same roof, or adjoining, or contiguous to it, 144, *notis.*

2 A whole house let ready-furnished is not within the penalties of the 3 & 4 Will. & Mary, against robbing ready-furnished lodgings, *Palmer's case*.....680

3 The 12 Anne, c. 7. making it a capital offence to steal to the amount of forty shillings, does not extend to a person's stealing to that

amount *in their own house*, for the statute evidently means stealing in the house of another, *E. Thompson's case* 338

4 And therefore if a wife steal the property of a third person *in the house of her husband*, it is not a stealing in the *house of another* within 12 Anne, c. 7. *Gould's case*.....217

Or if she steal it in her own house, *Macdaniel's case* 338

5 A house under repair, but not inhabited, is not the dwelling-house of the owner, though part of his property be deposited therein, if neither the owner nor any part of his family had previously inhabited it, *Lyon Lyon's case*.....185

6 A garret made use of as a workshop, and rented with a sleeping-room by the week, is *the house* of the tenant, if the landlord do not sleep under the same roof, *Carroll's case* 237

7 For where the owner, not being resident therein, lets out the whole house to several persons, each apartment is the mansion of each respective inmate; although the owner rents a cellar at so much a week, from the person who had taken that and other apartments from him at so much a year, *Rogers's case* 89

8 A house, the whole of which is let out in lodgings, and has one outer door common to all its inmates, is the mansion-house of its several inhabitants, *Trapshaw's case*.....427

9. Lofts over coach-houses and stables, converted into lodging-rooms, are the mansion-houses of their respective inhabitants, if there be a common outer-door, *Thomas Turner's case* 305

10 The name of *the owner* of the house is essential in an indictment for burglary and stealing in the dwelling-house, *White's case* 252

11 But in an indictment on the Black Act for shooting at another in any dwelling-house or other place, it does not seem necessary that the name of the owner of the house should be stated, though if stated, they must be strictly proved, *Harris's case* .....352, *notis.*

12 But in an indictment for robbing in a dwelling-house it is not necessary, *Pye's case* 352

13 An indictment for stealing from the *Invalid-office*, at *Chelsea*, the ground-floor of which was used by the Paymaster-General for the business of the office, but the upper part was wholly occupied by one of the officers, and the rent and taxes paid by Government, must lay it to be *the house* of the King, *Peyton's case*..... ...324

14 So an indictment for breaking into *Whitehall*, part of which was occupied by *Sir H. Hungate* as an inmate or lodger, must lay it the house of the King .....324, *notis.*

15 So of stealing from *Somerset-house*.....324, *notis.*

16 So if a house belonging to the *African Company* be broke open, and the goods of one of the Company's clerks residing and dwelling in the house be stolen, it must be laid to be the house of *the Company*, 324, *notis.*

17 But where a Company of Blanket Manufacturers, all living at *Whitney*, took a house in *London*, and paid the rent and taxes of it, but gave up the occupation of the dwelling part of it to a person who acted as their agent, upon an annual salary, lessened by his being permitted to live free of rent and taxes in the house, it was held to be *the house* of the agent in a case of *burglary*; for that the law of burglary was intended to protect *the repose* of the *actual occupier*, and

not merely *the property* of the *legal owner, Margett's case*.....930

18 So if any of the *City Halls* be broken into, and the house is occupied by *the Clerk* of the Company, it may be laid to be *his dwelling-house*.....931, *notis.*

19 If in maliciously shooting it be laid to have been in the dwelling-house of *John Brewer*, proof that the name is *James Brewer* is a fatal variance, *Durore's case* ...351

20 But it does not appear to be necessary to state the name of the owner of the house in which the offence is committed, *ibid.* 352, *notis.*

21 A *shop* adjoining to and under the same roof with a house, is part of the dwelling-house, although there be no internal communication between *the shop* and *the house*, and although no person sleep in the shop, *Gibson, Mutton and Wiggs's case*, 357

22 Adjoining houses, belonging to two partners, of which the rent and taxes are paid from the joint fund, may still be the respective mansions of each partner, if there be no communication from one to the other, but through the outer doors to the street, *Jones's case*, 537

23 If a landlord send a bank-note to a lodger up stairs to change, and he, under pretence of going to his banker to get it changed, run away with it, this is not within the 12 Anne, c. 7.; for it is a taking from *the person*, and not a stealing in the dwelling-house, *Campbell's case*, 564

24 So where a servant is induced by a ring-dropper to go to an adjacent public-house to concert measures respecting the division of the supposed prize, and put down his master's money on the table, and the prisoner takes it up and absconds, this is not a stealing in the dwelling-house, for the money was not under the protection of *the house*, but of *the person* of the prosecutor, *Owen's case* 572

25 An indictment for stealing in the dwelling-house, persons being therein and put in fear, must state that the persons were put in fear *by the prisoners, Etherington's case*, 671

26 Bank-notes are within the statute 12 Ann. c. 7. which makes it a capital offence to steal "any money, "goods, or chattels, wares or mer-"chandises," in a dwelling-house, to the amount of forty shillings, *Dean's case*.....693

27 A house of which the owner has no further taken possession than by depositing in it sundry articles of merchandise, neither he nor any servant of his having slept therein, is not the dwelling-house of the owner, *Harris's case* 701

28 A house into which the owner has only removed his goods, but has not slept in it himself, or otherwise taken personal possession of it, is not his dwelling-house, *Norreg Thompson's case* 771

29 If a brewer purchases the lease and furniture, with a view to let the whole to a tenant, and without any intention to reside in it himself, this is not his dwelling-house, *Davis's case*.....876

HOUSE-BREAKING.

1 On an indictment on 1 Edw. VI. c. 12. for breaking and entering a house in the day-time, evidence of breaking an inner door open, and the lock of a cupboard, after having fraudulently obtained admission into the house, is sufficient to support the indictment, *Hamilton and Chesser's case*, 348

2 The 3 & 4 Will. & Mary, c. 9. takes away the benefit of clergy from persons aiding and assisting house-breakers, under 39 Eliz. c. 15. *Mouncer's case*.....567

HUSBAND AND WIFE.

1 If a man and woman conspire together, and the man assume the name of and personate the woman's master, and marry each other in the feigned names with a view to raise a specious title to the master's estate, it is an indictable offence, although persons may marry in any names they please, and the object of the conspiracy is not effected, *Robinson's case* 37

2 If a wife consent to a felonious taking of her husband's property, the offender cannot be indicted for the larceny, *Harrison's case* ...47

3 If a husband return home, after his wife and children are a-bed, with intent to murder her, and cut her neck quite across, making a wound three inches in length, yet this is not a *lying in wait*, within the Coventry Act, *Lee's case* 51

4 Though a man and woman cohabit with each other as husband and wife, yet in contemplation of law they are considered as strangers, and not intitled to the privileges resulting from the nuptial state, *Mary Adey's case*.....210

5 If a wife steal the property of a *third* person in the house of her *husband*, it is not a stealing in the house of *another* within 12 Ann. c. 7. *A. Gould's case* 217

6 For the statute clearly means that the house in which the theft is committed must be the house of *another person*, *M'Daniel's case*.....338

7 An indictment for a robbery on an unmarried woman in her *maiden name* is good, although she marry before the Grand Jury return it a true bill, *Turner's case* 536

8 A wife, who by her husband's consent aids and assists him in effecting a larceny, cannot be convicted of the offence, *Hamilton's case*.....351

9 But if a wife utter a forged instrument when he is *not present*, she may be indicted as *a principal* on the statute; and if it appear she so uttered it by his instigation, he may be included in the same indictment as an *accessary before the fact* at common law, *Morris's case*, 1096

10 A wife may give evidence against a prisoner, although she entertain *a hope* that his conviction will tend to procure a pardon of her condemned husband, *Perreau's case*, 127

I.

INDICTMENT.

1 An indictment on 5 Geo. II. c. 30. against a bankrupt for concealing his effects, must charge that the commission had *duly issued*; that he had notice to attend the Commissioners, *or the major part of them*; that the five Commissioners were *named* in the notice to surrender; and not merely that he was required to surrender to "*the Commissioners at Guildhall*," *Frith's case* 10

2 The Court will not quash an indictment after the prisoner has pleaded, and the Jury are charged to try it on account of a defect in form, but will put him on his defence, and enter a verdict of acquittal.....11

3 Formerly, a prisoner, on his acquittal upon the merits of his case, was intitled *ex debito justitiæ* to a copy of the record, but not if the acquittal was owing to defect of form, or the incompetency of witnesses, *Brangan's case*, 27

must shew that the Court where it is found had jurisdiction over the offence, *Rex* v. *Fearnley*.....425

31 An indictment for stealing and receiving bank-notes, laying them to be "the property and chattels of "the prosecutor," is good against the principal, although calling them *chattels* is improper, for that word may be rejected, as to the principal, as surplusage, *Morris's case*.....468

32 An insensible indictment may be made good by rejecting such words as obstruct the sense, *Redman's case*.....477

33 An indictment on the 30 Geo. II. c. 24. for obtaining money under false pretences must state what *the false pretences* were by which the money was obtained, *Rex* v. *Mason*.....487

34 An indictment at common law will lie for taking *a dead body* from its *grave*, although intended to be used for the purposes of *dissection*, *Lynn's case*.....497

35 If an Act of Parliament vest property in *trustees* by a *particular description*, without *incorporating* them, the indictment must lay the property to be in them by their *proper names*, and subjoin the *particular description* to denote the capacity in which they are authorized to act, *Sherrington and Bulkley's case*.....513

36 An indictment for not repairing a common highway, leading *from A. to* the parish of *B.* is *exclusive* of *B.* although it afterwards allege that the part of the said road which is out of repair is *in* the parish of *B. Rex* v. *Gamlingay*.....528

37 Two indictments for the same offence, one for *the felony* under a statute, and the other for *the misdemeanor* at common law, ought not to be preferred or found at the same time, *Mary Doran's case*, 538

38 An indictment on 3 Will. and Mary, c. 9. against *two persons* for robbing a lodging, must state *a joint contract*, *Goddard's case*, 545

39 An indictment on the statute 6 Geo. I. c. 23. must shew that the assault and the injury to the clothes were committed at the same time, *Williams's case*.....529

40 An indictment for a robbery on a woman in her maiden name is good, although she marry before the indictment is preferred, *Turner's case*.....536

41 An indictment for a highway robbery must state that the assault was *feloniously* made, *Pelfryman's case*, 563

42 An indictment for a misdemeanor on 22 Geo. III. c. 58. against a receiver of stolen goods, need not aver that the principal has not been convicted, *Baxter's case*.....578

43 An indictment for an assault, describing the defendant as "late of "*A.* in the county of *B.*" without stating that *A.* is a parish, is bad. *Mathew's case*.....584

44 An indictment for an offence at *common law* is good, though it concludes *against the statute*; for these words are *surplusage*, and may be rejected, *ibid*.....585

45 An indictment on 3 & 4 Will. and Mary, c. 9. s. 5. is good, without stating that the goods were *then* let, &c. *Burnell's case* 588

46 An indictment for forging a bill of exchange, stating that it *purported* to be directed to *John King*, by the name and description of *John Ring*, is bad, *Reading's case*.....590

47 So an indictment for forging a scrip receipt, stating that it was signed with the name *C. Olier*, PUR-

PORTING to be signed by one *Christopher Olier*, is bad; for "*C. Olier*" does not on the face of it purport to be *Christopher Olier*, *Reeves's case*, 808

48 So an indictment for forging a bill of exchange, directed to *Ransom*, *Moreland*, and *Hammersley*, stating that it PURPORTED to be directed to *George Lord Kinnaird*, *William Moreland*, and *Thomas Hammersley*, by the name and description of "*Ransom*, *Moreland* and *Hammersley*," is bad, for the purport and the tenor are repugnant, *Gilchrist's case*.....657

49 In an indictment for forgery, the instrument charged to be forged must be set out, that the Court may see whether it is an instrument within the statute on which it is founded, *Lyon's case*.....597

50 An indictment on the 15 & 16 Geo. II. c. 28. for uttering bad money by the common trick called *ringing the changes*, is good, although it do not state that it was uttered *in payment as and for good money*, for the words of the statute are in the disjunctive, "utter OR "tender in payment," *Franks's case*.....644

51 An indictment for a fraud at common law, charging the *false pretence* to have been made to one person, and *the deceit* to have been practised on a different person, is bad, *Lara's case*.....647

52 An indictment on the statute 16 Geo. II. c. 31. which makes it felony to aid and assist any prisoner in *an attempt* to make his escape, charging the prisoner with having aided and assisted such attempt, need not state that the party aided did attempt to make the escape, *Tilley's case*.....662

53 An indictment for stealing in the dwelling-house, persons being therein, and put in fear, must state that the persons were put in fear *by the prisoners*, *Etherington's case*.....671

54 An indictment for forging a transfer of stock is good, although the stock never had been *accepted* by the person in whose name it stood, and although the transfer was not witnessed according to the rules and directions of the Bank, *Gade's case*.....732

55 An indictment for burglariously breaking and entering the house of *A. with intent to steal the goods of B.* although no person of the name of *B.* had any property in the house, is good, for the offence is the *intent to steal*, *Jenks's case*.....774

56 An indictment on the statute 37 Geo. III. c. 70. for seducing soldiers, need not set out *the means* used for that purpose, nor aver that the prisoner *knew* the person endeavoured to be seduced *to be a soldier*, *Fuller's case*.....790

57 An indictment on 37 Geo. III. c. 70. is good, although it charge in one count two of the offences mentioned in the Act, *viz.* that the prisoner endeavoured to incite the soldier "to commit an act of mu-"tiny," AND "to commit traito-"rous and mutinous practices," *Fuller's case*.....790

58 An indictment for perjury, laying the offence to have been committed "at the *Guildhall* of the "city of *London*," is bad, for the *venue* must be laid from some *parish* or *ward*, *R. Harris's case*.....800

59 An indictment for forgery must set out the instrument according to its *tenor*, but it need not describe the *purport* of the instrument, *Reeves's case*.....808

60 An indictment on the statute 15 Geo. II. c. 8. s. 3. for uttering false money twice or oftener within ten days, must state the whole

charge in one count, *E. Tandy's case*.....833

Same point, *Smith's case*.....856

61 An indictment on 15 Geo. II. c. 28. for uttering counterfeit money, having at the same time other counterfeit money in custody, is good, although it do not allege the offender to be *a common utterer of false money*, *Smith's case*.....858

Same point, *M. Michael's case*, 938

62 An indictment for larceny, laying the goods stolen to be the property of *Victoire Baroness Turkheim*, if she was always known by that appellation, is good, although the name of the prosecutrix is *Selina Victoire*, and the words "*Baroness* "*Turkheim*" her title only, *E. Sulls's case*.....861

INFANT.

1 The testimony of infants cannot be received in any case, except *upon oath*; and their competency to be sworn depends upon their understanding its obligations, *Powell's case*.....110

2 Therefore an infant witness, under *seven years* of age, if apprised of the nature of an oath, must be sworn; for no testimony is legal except it be upon oath, *Rex* v. *Brasier*...199

3 If wearing apparel be taken from the person of *an infant*, they must be laid to be the property of *the infant*, and not of *the parent*. *Sed qu.* if it will not be good either way.....464, *notis.*

INFORMATIONS.

1 By 2 & 3 Phil. & Mary, c. 10. the Justices before whom any person shall be brought for felony, or suspicion thereof, shall take the *examination* of the prisoner, and the *information* of the witnesses of the fact and circumstances, and *shall* put the same, or so much as is necessary to prove the felony, *into writing*, within two days after, in the same manner, before commitment, as is required by 1 & 2 Phil. and Mary before bail, *Lamb's case*, 557

2 Courts will presume that informations have been taken as the statutes direct, and therefore will not receive parol testimony of what passed before the magistrate, except it be proved that the information was not taken in writing, *Fearshire's case*.....202

3 The statutes do not leave this to the option of the magistrate, but they say that he *shall* do it, and the Court will presume that the magistrate has done his duty, until the contrary appear, *Jacobs's case*.....310

4 It would be permitting the negligence of the magistrate to operate to the prejudice of the prisoner, as a witness might, by stating only part of what had been said, or by using different words, give a different colour to the fact, *Hinxman's case*.....310, *notis.*

5 And this practice has been adopted in other cases, *Fisher's case*, 311, *notis.*

6 But if reduced into writing, the information so taken may be read though the prisoner refuse and the magistrate neglect to sign it, *Lamb's case*.....552

7 So the minutes of the information taken by the solicitor for the prosecution, may be read, though in part retracted by the prisoner, and not signed by the magistrate, *Thomas's case*.....637

INNKEEPER.

1 If the property of a guest be stolen from the inn where he is sojourning, it may be laid, in the indictment, to be the goods of the inn-

keeper, as well as of the guest, *Todd's case*.....357, *notis.*

INTENT TO ROB.

1 By 7 Geo. II. c. 21. "to assault another with any offensive weapon, OR by menace, OR in or by any forcible and violent manner to demand any money or goods of or from any other person, with intent to commit robbery," is a single felony.....267

2 An indictment on this statute must state that the assault was made with an *offensive weapon*, or that *a demand* was made of money or goods, *Jackson and Randall's case*.....267

3 But the *demand* may be made by *action*, as well as *speech*, as if a man deaf and dumb stop a carriage, and put his hat into the coach with one hand, while he presents a pistol to the passengers with the other, *P. Parfait's case*.....19

4 The *assault* and the *demand* must be made on the person or persons intended to be robbed, *William Thomas's case*.....330

5 A commitment on 7 Geo. II. c. 21. charging that the defendant, "with "force and arms, made an assault "on *A.* with intent feloniously to "steal, take, and carry away from "the person of the said *A.* &c." is bad, *Remnant's case*.....583

6 The manner in which an assault with intent to rob must be charged in an indictment on the statute 7 Geo. II. c. 22. *Monteth's case*, 702

JUDGMENT.

1 An indictment against a receiver of stolen goods, stating that the principal was duly convicted, is good, though it do not shew that *judgment* was passed upon him, *Hyman's case*.....925

2 On a special verdict for *felony* in stealing charters concerning the inheritance, which is not felony, the Court will not give judgment for the *trespass*, *Westbeer's case*.....15

JURISDICTION.

1 In murder the *jurisdiction* attaches where the *death happens*, and not at the place from whence the cause of the death proceeds, *Coombes's case*.....388

2 The offence must be alleged to have been committed on the high seas to shew the admiral's jurisdiction under 28 Hen. VIII. c. 15. .....*ibid.*

3 Courts of Common Law have a concurrent jurisdiction with the Admiralty Courts in murder committed in *Milford Haven*, and in all other havens, rivers, and creeks in the realm, *Bruce's case*.....1093

4 If a servant embezzle money contrary to 39 Geo. III. c. 85. in a different county from that in which his master lives, it may be tried in the county in which the master resides, *Taylor's case*.....974

5 And perhaps it is triable in either of the counties, *Hobson's case*, 976

JURY.

1 If the sheriff return the Jury to try an indictment in which he is the prosecutor, the objection must be made by way of *challenge*, and cannot be moved in *arrest of judgment*, *Conrad Shepherd's case*, 101

2 The Jury are the judges of the *intention* with which a prisoner did the act alleged against him, *Pear's case*.....212

3 As if a horse be lent to a person to ride to a certain place, but instead of so doing he rides it to another place and sells it, the Jury shall say *quo animo* he did the act, *Tunnard's case*.....214, *notis.*

4 So where a chaise was hired for an indefinite time and the hirer never returned it, it is for the Jury to say whether the original hiring was felonious, *Aickle's case* 422

5 But in murder where the malice is *implied*, the *Court* and not the *Jury* is to determine the fact, *Hazell's case* 370

6 A *Scotch* covenanter may be sworn as a *Juryman* in a court of criminal law, by the ceremony of holding up his hand, without kissing the book, *W. Walker's case* 498

7 Though the Jury be charged with a prisoner for *felony*, yet if he be suddenly taken ill, *the Jury may be discharged* of that indictment, and another Jury charged with the trial of the prisoner on his recovery, *Stephenson's case* 546

8 So if a Juror be taken ill during the trial, the Jury may be discharged, and the remaining eleven, together with a new Juror, re-sworn to try the prisoner, *Scalbert's case* 620

JUSTICE OF PEACE.

1 The power exercised by Justices of Peace in admitting accomplices to be witnesses for the Crown, is founded on practice only; but they cannot, by such means, exempt accomplices from being prosecuted, *Rudd's case* 123

2 On admitting an accomplice a witness for the Crown, he should be kept in custody, *Rudd's case*...115

3 The statutes P. & M. require Justices to take all examinations and confessions in writing, *Fearshire's case* 202

4 Evidence cannot be received of what passes before the magistrate on the examination of a prisoner, unless it be proved that it was not reduced into writing, for Courts will presume that the magistrate has done his duty until the contrary be shewn, *Jacob's case*...309

5 It is the indispensable duty of every Justice of the Peace to take an information in writing, in all cases, whether of felony or misdemeanor, *Fearshire's case*.....202

L.

LARCENY.

1 Larceny is the felonious taking of the personal property of another from his *possession* and *against his will*, *Bazeley's case*.....835

2 But the assent of the owner to give *facility* to the commission of a larceny, for the purpose of detecting the offenders, does not do away the felony, although the property was not taken against his will, *Egginton's case* 913

3 Therefore where a man was suspected of a design to purloin what he could find in the yard of an inn, and the landlord to try him put a handkerchief in his way, which he took and ran away with, yet this was holden to be larceny, *Hopdealer's case* 921

4 So where the servant of an alderman, with his master's consent, shewed certain thieves who had previously resolved to rob the house, on their getting into the house, where the plate was, and they removed it with intent to carry it away 922

5 Larceny may be committed of a *single bank-note*, although the 2 Geo. II. c. 25. which makes the stealing *choses in action* felony, speaks only of *bank-notes* in the plural number, *Hassel's case* 1

6 But a commission issued out of Chancery for the purpose of set-

tling the boundaries of a manor, is not the subject of larceny, for it savours of the realty, *Westbeer's case* 13

7 So goods obtained by the consent or connivance of the owner's wife, are not the subject of theft, *Harrison's case* 47

8 It was not larceny, but only breach of trust, by the common law, for a cashier of the Bank to embezzle an India Bond committed to his care, pursuant to the statute 12 Geo. I. c. 32. if after he received them he kept them in his *own possession*, and never delivered them into *the possession* of his employers, *Waite's case* 28

9 But now by 39 Geo. III. c. 85. the possession of the servant is the possession of the master 849

10 But if a sorter of letters belonging to the Post-office, has a letter containing a bank-note delivered to him to sort, and he break open the letter and steal the note, this is larceny at common law, *Hassel's case*, 1

11 To order goods of a tradesman to look at, under pretence of purchasing them, and to run away with them before any sale of them has taken place, is larceny, *Greatrix and Sharpless's case* 92

12 Money stolen from a letter secreted by a servant of the Post-office, is a larceny at common law; but he cannot be indicted for secreting the letter on the 5 Geo. III. c. 25. *Skutt's case*.....106

13 To pull wool from the bodies of live sheep and lambs, if done not in frolic, but with an intent to steal it, is larceny, *Martin's case*.....171

14 So also larceny may be committed by taking the *milk* from a cow; for it would be theft to steal the cow herself, and therefore felony to steal the product of the living animal 172

15 If a horse be obtained on pretence of hiring it, the delivery of it by the owner does not divest him of the right of possession, and therefore if the original hiring was with intent to steal it, the party is thereby guilty of *larceny*, *Pear's case* 212

16 But if a horse be delivered to the pretended purchaser *upon a bargain made*, it is not felony, though he immediately ride away with it without paying the money, *Justin Harvey's case*.....467

17 To remove goods *animo furandi* from the head to the tail of a waggon, is not only a sufficient *taking*, but a sufficient *carrying away*, to constitute the crime of larceny, *Coslet's case*.....236

18 But if the package intended to be stolen lie in an horizontal posture, and be only raised from the ground, and set perpendicularly on its end, without being removed from the spot where originally deposited, this is no *asportation*, *Cherry's case*, 237 *notis*.

19 To obtain property from another by the practice of *ring-dropping* is larceny, if it appear that the property was taken out of the possession of the owner, and without his consent, *Rex* v. *Patch*.....238

20 If a master *deliver* property into the hands of his servant for a *special purpose*, as to leave it at the house of a friend, or to deposit it with a banker, and the servant instead of so doing, convert it feloniously to his own use, the property is not parted with by such delivery, but still remains in the constructive possession of the owner, *Lavender's case* 870

21 So where a surrogate gave his clerk £3. 18*s*. for the express purpose of buying blank licences with it, in-

stead of which he ran away with the money, *Watson's case* 870

22 But where the prosecutor having purchased a large estate, and wishing to be prepared with the purchase-money, was persuaded by his stock-broker to sell out of the funds and invest the produce in exchequer bills, *for which purpose* he gave the prisoner a draft on his banker for £20,000, which the prisoner received, but only invested part of it in exchequer bills, and ran away with the remainder, it was held that the prosecutor had, by this delivery, parted with the possession and the property also, upon a trust and confidence that the prisoner would honestly perform the condition upon which the delivery was made, *Rex* v. *Walsh* 1064

23 But now it is, by 52 Geo. III. c. 63. made a transportable misdemeanor for any broker or agent to misapply the several species of property therein mentioned, contrary to the order he shall receive in *writing* for any special purpose therein mentioned 1082

24 So if a *servant* to whom goods have been delivered by his master to carry to a customer, sell them, and convert the money to his own use, he is guilty of larceny; for the right of *possession* is not out of the *master* by such delivery, *W. Bass's case* 251

25 If a person be persuaded to lay down money, and to play at cutting the cards, and, on a dispute arising whether he had lost, one of the confederates sweep away the money and go off with it, this is *a stealing* from *the possession* of the owner, if done with a felonious design, *Rex* v. *Horner*.....270

26 Where the taking to a certain amount constitutes the crime, the goods must be taken to that amount at one and the same time, for several petty larcenies cannot be combined so as to constitute grand larceny; nor can several grand larcenies be conjoined so as to constitute a capital offence, *Petrie's case* 294

27 To obtain premeditatedly a bill of exchange from an indorsee under pretence of getting it discounted, is larceny, if the indorsee did not intend to leave the bill in the prisoner's possession without the money, for in such case *the property* is not parted with, *Rex* v. *Aickles*, 294

28 If a servant obtain gold coin from her master, on pretence of being able to get it changed into silver, but with a real design to steal it, it is larceny, *Anne Atkinson's case*, 302, *notis.*

29 So where a prisoner having possession of a quantity of gold coin, gave it to a stranger in exchange for bank-notes, telling him that if he wanted any more and would give him notes, he would go and get them changed for him, upon which the stranger put down bank-notes, which the prisoner took up and ran away with them, this was held larceny notwithstanding the *delivery*, for being for a special purpose, the right to the property still remained with the owner, *Oliver's case* .....1072, *cited*

30 So if a bank-note be given by a landlady to her lodger, and he go away with it under pretence of going to a banker's to get it changed, *Campbell's case* 564

31 Stealing deal-boards from a barge aground in *Limehouse-dock* is not a larceny on *a navigable river* within the 24 Geo. II. c. 45. for Limehouse-dock is a creek not a river, *Pike's case* 317

32 To steal lead affixed to a church is a larceny within the penalties of 4 Geo. II. c. 32. for a church is

a *building* within the meaning of the Act, *Hickman's case*.....318

33 To tear an ear-ring from a lady's ear, so as to separate it from the ear, is a sufficient *taking* and *carrying away* to constitute larceny, although it be afterwards found among the curls of the hair, *Lapier's case* 320

34 To remove sheets from a bed, and to carry them into an adjoining room with intent to steal them, is larceny .....322, *notis.*

35 To take plate from a trunk, and lay it on the floor with intent to steal it, is a sufficient *taking* and *carrying away*, *C. Simpson's case*, 322, *notis.*

36 But if *a thief* order the *true man* to lay his goods on the ground, but is detected in his intention to steal them before he has taken them up, this is neither a *taking* nor a *carrying away*, *E. Farrel's case*, 322, *notis.*

37 The 12 Ann. c. 7. taking away clergy from the offence of stealing to the amount of forty shillings in a dwelling house, does not extend to such a stealing *in the prisoner's own house*, *E. Thompson's case*..338

38 The felonious intent to steal must exist *at the time* the property is taken; for an obtaining, innocently or by *contract*, and *fraudulently* converting afterwards is no felony, *Charlewood's case* 409

39 Therefore where the prosecutor's shop was on fire, the prisoner, a neighbour, assisted among other persons in removing the property, and afterwards denied having them, and converted the property so removed to her own use, and the Jury found that when she first took the goods she had no intention to steal, the Judges held it no felony, *Leigh's case* .....411, *notis.*

40 Where there is *a privity of contract*, larceny cannot be committed; but if after the privity be determined, the goods be taken *animo furandi*, it is felony, *ibid*.....409

41 If a hackney-coachman, in whose coach a parcel is accidentally left, use no endeavours to restore it to the owner, but detain it, open it, and convert the contents to his own use, it is larceny; for though he obtains the property by *finding*, yet as it was *not delivered* to him, he has no *right* to it, and therefore the *conversion* of it is a taking from the *possession* of the owner, *W. Wynne's case* 413

42 So where a lady on being set down ordered the hackney coachman to deliver her parcel to her servant, which he neglected to do, and instantly drove away, and converted part of its contents to his own use, *Sear's case* .....415, *notis.*

43 So in a case where a bureau was delivered to a carpenter to repair, and he discovered money in a secret drawer of it, which he broke open and converted the contents to his own use, this was held larceny, *Green's case*.....952

44 Obtaining a horse by pretending that another person wanted to hire it to go to B. is a felonious obtaining, if the party appear to have intended at the time to steal it, as by not going to B. but immediately going elsewhere and selling it, *Charlewood's case* 409

45 So a person who hires a post-chaise for an indefinite length of time, as, "to go round the north," and converts it to his own use, he is guilty of larceny, if the taking and conversion was *ab origine felonious*: for the delivery was for a *special purpose*, and though *the possession* was parted with, the *property* ulti-

mately remained with the owner, *Major Semple's case*.....420

46 To obtain goods of a tradesman under *a false pretence* of being sent for them by *a customer* whom the tradesman is in the habit of trusting, and to whom he intended to give credit is *a fraud*, and not a felony, for *the property* was parted with, *Cockwaine's case*.....498

47 But if a stranger under pretence of being sent by a customer who has purchased the property, obtain it from the vendor's servant as he is carrying it to the house of the purchaser, it is larceny, for *the property* is still with the tradesman until delivered to the vendee, *John Wilkins's case*.....520

48 A bank-note delivered to the prisoner for the purpose of going to a banker's to get it changed, continues in the possession of the owner, *Campbell's case*.....564

49 So if a ring-dropper receive the property of another, on depositing the *ring* with him, promising to restore the property the next day, and as much more as will redeem the ring, it is a felonious taking; for the property was delivered on *a condition* to restore it, *Owen's case*.....572

50 But if a person play at *hiding under the hat*, and stake down his money voluntarily on the event, meaning to receive the stake if he wins, and to pay it if he loses, a player taking up the stakes deposited on the table, is not a felonious taking from the possession of the owner, although the whole was a scheme of fraudulent conspiracy and collusion, *Chappel's case*...610

51 So if a tradesman sell a stranger goods, enter them to his debit, and make out a bill of parcels for them as goods bought, and the goods are delivered to the prosecutor's servant who receives bills for the amount, it is not a felonious obtaining, although the tradesman expected ready money and gave no credit, and the bills are forged and the prisoner's lodgings were taken for the very purpose of the fraud, *Parkes's case*, 614

52 But if the condition of a *ring-dropper* be that if he do not restore the property by such a time the whole of the ring shall belong to the dupe who delivered the property, it is felony; for although the *possession* is parted with, the *property* still remains with the owner, *Watson's case*.....640

53 So if the party duped be induced to deliver twenty guineas, and four doubloons to the ring-dropper on receiving the ring, on a promise that the ring-dropper shall the next day return the twenty guineas, and the four doubloons, and the dupe restore the ring, it is felony, for the guineas and doubloons were only *deposited* as *a pledge* on the security of the ring, but not parted with as *a loan*, *H. Moor's case*.....316

54 So where *the ring* was deposited in the hand of the prosecutor, on his giving 50*l.* to the prisoner, on a condition that the prisoner would in half an hour bring back the 50*l.* to the prosecutor, and also 80*l.* for his half of the supposed prize, and take back the ring, it was held felony, *Marsh's case*.....345

55 To constitute larceny within 2 Geo. II. c. 25. the property must be available and of *value*, and taken from the *peaceable possession* of the owner, *Mrs. Phipoe's case*.....673

56 Therefore where a person was compelled by duress to make a promissory note on stamped paper, previously prepared by the prisoner who was present during the time, and withdrew the note as soon as it was

made, it was held neither a stealing nor a robbery of the note within the statute, *Phipoe's case* 673

57 If a merchant's clerk take a bill of exchange from the bill-box, and convert it to his own use, although trusted to manage all the cash concerns of the house from week to week, it is felony; for as it was not delivered to him, it is a tortious taking from the possession of the master, *Chipchase's case*.....699

58 So if a banker's clerk be sent with the keys of the strong-room to fetch a bag of money for the use of the shop, and he take that opportunity to take another bag which he converts to his own use, this is felony, and not a mere breach of trust, *Murray's case*.....844

59 If a cornfactor purchase a vessel laden with corn, and send *his* lighter to fetch it from the ship in loose bulk, and the lighterman contrive to have a certain portion of it put into sacks by the meters on board the ship, and take the corn so sacked feloniously away immediately from the ship, he may be indicted for stealing the property of the cornfactor, although it was never put into *his* lighter, or otherways reduced into the cornfactor's possession, *Abrahat's case* 824

60 And clearly so if put on board the owner's lighter, for then it is as much in his possession as if it had been in his granary, *Spear's case*.....825

61 The property must be taken from the possession of the owner, and therefore if a banker's clerk or cashier, intrusted to receive bank-notes and money at the shop counter, instead of putting them into the cash or bill-drawer, secrete them, and convert them to his own use, it is, at common law, a mere *breach of trust*, and not felony; for the property was never in the banker's possession, *Bazeley's case*.....835

62 But this is now remedied by the 39 Geo. III. c. 85., which enacts, that if any servant whosoever shall receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security, on account of his master, and shall embezzle the same, he shall be deemed to have feloniously stolen the same, although the same was no otherwise received into the possession of the master than by being so taken into the possession of the servant....849

63 An indictment therefore on this statute must contain all the requisites of an indictment for *larceny* at common law, for the Act does not create *a new felony*, but merely makes the possession of the servant the possession of the master, *Mc Gregor's case* 932

64 If a servant receive monies in *one county* on account of his master, who lives in *another county*, and embezzle it, he may be indicted in the county in which the master resides, *Taylor's case*.....974

65 But in order to found the judgment of transportation inflicted by this statute, the indictment must be specially drawn, so as to bring the case within it, *Jones's case*, 933, *notis.*

66 And by 52 Geo. III. c. 63. if any banker, merchant, broker, attorney, or agent, embezzle any property deposited with them for *safe custody* or *special purpose*, it is punishable as a misdemeanor, 932, *notis.*

67 A person who *procures possession of a house*, under a written agreement, between him and the landlord, for a lease of twenty-one years, with a fraudulent intention to steal the fixtures thereto belonging, is, by stealing the lead fixed

to the house, guilty of larceny on the statute 4 Geo. II. c. 32. *Munday's case*.....850

68 If a banker's clerk *procure a genuine draft* from a customer to the house, by falsely representing that he paid in a sum of money to the amount, and then contrive to hide the fact by making false entries in his employer's books, his paying to himself the amount of such check is a felonious taking from the possession of the bankers, for the whole transaction is a *fraudulent* contrivance to get the money under colour of a legal authority, *Hammon's case*.....1083

LAUNDRESS.

1 If linen or other property delivered to a laundress to wash, be stolen while in her custody, they may be laid to be her goods, *Packer's case*.....357, *notis.*

LETTERS.

1 Letters which have never been in the custody of the prisoner cannot be read in evidence against him, *Hevey's case*.....235

2 Therefore on an indictment for forging a bank-note, a letter purporting to come from the prisoner's brother, and left by the post-man pursuant to its direction, at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, cannot be given in evidence, *Huit's case*.....820

LETTERS, THREATENING.

1 By 9 Geo. I. c. 22. if any person or persons shall knowingly *send* an anonymous letter, or a letter with a fictitious name, demanding money, venison, or other valuable thing, he shall suffer death without clergy.....445

2 But if the person of the writer of such a letter be made known to the party threatened, either by the *hand-writing*, or by the *subject of its contents*, it is the same as if he had *signed it* in his real name, *Heming's case*.....445, *notis.*

3 The mere *writing* of such a letter, unless it be *sent*, is not within the Act, *Hammond's case*.....446

4 By 27 Geo. II. c. 15. if any person shall knowingly *send* any such letter, without any name subscribed thereto, or signed with a fictitious name, threatening to kill or murder any person, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money, venison, or other valuable thing, be demanded, they shall suffer death without clergy.....445

5 By 30 Geo. II. c. 24. all persons who shall knowingly *send* or *deliver* any letter or writing with or without a name subscribed thereto, or signed with a fictitious name or letter, threatening to accuse any person with a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort money, goods, wares, or merchandise, incur a discretionary punishment of fine, imprisonment, pillory, whipping, *or* transportation.....445

6 By 52 Geo. III. c. 64. the 30 Geo. II. c. 24. is extended to any bond, bill, note, or other security for payment of money, &c.....773, *notis.*

7 If a person deliver a threatening letter, sealed up and directed to the person threatened, to another person to carry to the Post-Office, such a delivery is evidence of the person delivering it knowing its contents, *Girdwood's case*.....142

8 And if such a threatening letter be delivered at a Post-Office in *London*, directed to a person in *Middlesex*, the person delivering it in *London* may be tried in the county where the letter is ultimately received, *ibid.*.....143

9 The statutes of 9 Geo. I. c. 22. & 27 Geo. II. c. 15. do not extend to the case of a prisoner's *delivering* a threatening letter himself to the party threatened, for that is not *sending* it within the meaning of the words of those statutes, *Hammond's case*.....444

10 The statute 9 Geo. I. c. 22. respecting threatening letters, is not repealed by the statute 30 Geo. II. c. 24. upon the same subject, *Robinson's case*.....749

11 A *bank-note* is a valuable thing within the meaning of the statute 9 Geo. I. c. 22.....*ibid.*

12 A *demand* of money, venison, or other valuable thing, is sufficiently made by signifying an intention to impute the crime of murder to the party from whom it is attempted to be obtained.....*ibid.*

13 A letter signed by two initials, as *R. R.* is a letter without *a name* subscribed thereto, within the meaning of the statute 9 Geo. I. c. 22. *ibid.*

14 A letter threatening to accuse a person of an unnatural crime, unless he re-delivers to the writer a *promissory note* which he had before given him in discharge of a debt, was not within 30 Geo. II. c. 24. *Major's case*.....772

15 But now by 52 Geo. III. c. 64. the statute 30 Geo. II. c. 24. includes not only "money, goods, wares, and merchandises," but "bonds, "bills of exchange, bank-notes, pro- "missory notes, or other security "for the payment of money, or "warrant or order for payment of "money, or delivery or transfer of "goods, or other valuable thing." 773, *notis.*

LODGINGS.

1 By 3 & 4 Will. & Mary, c. 9. if any person shall take away, with an intent to steal, any chattel, bedding or furniture which by contract he is to use, or shall be let to him to use in or with such lodgings, it shall be deemed larceny and felony.....683

2 This statute was intended to apply only to cases where the owner of the house had *the possession*, and the inmate *the use* of the apartments so let to him, and therefore does not apply to a person who has a whole ready-furnished house, and inhabits it wholly himself, *Palmer's case*.....693

3 This distinction between *houses* and *lodgings* seems explained by 30 Geo. III. c. 3. which gives a penalty against *householders* for not giving an account of their *lodgers* to the Assessors of the Land-tax, 693, *notis.*

4 So also as to burglary: the apartments let are the *mansion-houses* of their respective inhabitants, if the landlord do not sleep under the same roof, *Carroll's case*.....237

5 An indictment on the 3 Will. and Mary, c. 9. must state *by whom* the lodgings were let, *A. Pope's case*.....336

6 Two persons cannot be convicted on the same indictment on the statute of 3 Will. and Mary, c. 9. unless *a joint contract* be stated, *Goddard's case*.....545

7 An indictment on 3 & 4 Will. and Mary, c. 9. is good, without stating that the goods were *then* let, &c. *Burnell's case*.....588

8 An indictment for robbing lodg-

ings, stating that they were let to the prisoner by *A. B.* is supported by evidence that they were let by his wife 705

9 A person who is let into the entire possession of a *ready-furnished house*, is of course the *owner* of it during his term, and cannot be guilty of felony within the statute 3 & 4 Will. III. c. 9. by stealing any of the goods let to him to use with such house; for the statute extends to *lodgings* only, *Palmer's case*.....680

M.

MAIMING.

1 By the 22 & 23 Car. II. c. 1. if any person shall on purpose, and by lying in wait, unlawfully cut out or disable the tongue, put out the eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member of any person, with intent in so doing to maim and disfigure such person, he shall suffer death without clergy.....51

2 If the intent be to *murder* and not merely to *maim*, yet it is an offence within this Act, *Coke and Woodburn's case*.....532, *notis.*

3 A husband returns home after his wife and children are in bed and asleep, and cuts his wife's throat with a razor, making a wound three inches in length quite across her neck, yet this is not a *maiming* or *lying in wait* within this statute, *Lee's case*.....51

4 A large transverse wound across the nose, so wide and deep as to render the bone visible, is *a slitting of the nose* within the penalties of the *Coventry Act*, although the nostril is not thereby perforated, *B. Carroll's case*.....55

5 To follow an accomplice in picking pockets, with intent to maim *any* person who shall apprehend him, is *a lying in wait* within the meaning of *Coventry Act*.....57, *notis.*

6 By 9 Geo. I. c. 22. if any person or persons shall unlawfully and maliously kill, *maim*, or wound any cattle, every person so offending shall suffer death, without the benefit of clergy 72

7 Persons present, aiding and assisting, are equally guilty with those who actually commit the fact, *Midwinter and Sims's case*.....66, *notis.*

8 The 9 Geo. I. c. 22. was designed to extend the offences described in the 22 & 23 Car. II. c. 1.; and therefore horses, mares, and colts, are included in the word *cattle*, *Paty's case*.....72

9 To bring an offender within the 22 & 23 Car. II. both the *malice* and the *lying in wait* must be proved to have been with intent to maim and disfigure, *Tickner's case*, 187

10 To constitute an offence under the *Coventry Act* it must be committed with a certain degree of preparation, as by watching an opportunity for the purpose, and with such a degree of deliberation as marks a malicious intention and a wilful design to commit this act of cruelty, *Mills's case*.....259

11 Therefore where the commander of a press-gang maimed a man whom he casually met, and who resisted being impressed (being in truth no mariner), but against whom he appeared to have an antecedent grudge, is not *a lying in wait* within the statute, *Mackay's case*.....189, *notis.*

12 To constitute the offence under the *Black Act* of maliciously maiming cattle, it must appear that the maiming was committed from *a malicious motive to the owner* of the cattle, *Pearce's case*.....527

13 And therefore if the maiming be done in a moment of passion against the animal, it is not within the act, *Shepherd's case*.....539

14 As where a farmer's servant, having an unruly gelding in his team, applied to his master to change it for another horse, and, on being refused, maimed the gelding in a moment of passion, by beating him violently with the butt-end of his whip with one hand while he held him fast by the tongue with the other, *Shepherd's case*.....539

15 But it is not necessary that the maim should be mortal, for if a man, from malice to the owner, drive a nail into the frog of a horse's foot, so as to render the horse useless, it is a capital offence, though the injury be not permanent, and the horse is likely to recover, *Heywood's case*.....539, *notis.*

16 And where the prisoner had cut the tendons of the hinder legs of several sheep that had from time to time broke over into his inclosure, it was held not within the statute, for this was evidently resentment against the particular animals, and not from any personal malice against the owner.....540, *notis.*

17 But it is not necessary in these cases for the prosecutor to prove a previous existing malice against the owner, *Ranger's case*.....540, *notis.*

18 By 43 Geo. III. c. 58. if any person shall *stab* or *cut* another with intent to murder, rob, maim, disfigure, or disable such person, or with intent to do some other grievous bodily harm, or with intent to obstruct, resist, or prevent the lawful apprehension or detainer of any accomplice, he shall be guilty of felony without clergy.....261

MANSLAUGHTER.

1 A quarrel arose between several soldiers and a number of keelmen; one of the soldiers, to protect himself and his comrades from the assaults of the mob, drew his sword, and mistaking a person passing by for one of the keelmen, struck him on the head with his sword, of which blow he died. This was adjudged *manslaughter* only, *J. Brown's case*.....148

2 *A.* and *B.* suddenly quarrelled. *A* using provoking language, *B.* seized *A.* by the collar; a fight ensued; they both fell to the ground; and while struggling on the ground, *B.* received a mortal wound from a knife which *A.* held in his hand: this adjudged *manslaughter* only, *Snow's case*.....154

3 If a peace-officer, in attempting to execute a warrant on the person named in it, be, before any caption made, stabbed and killed by a woman who was cohabiting with the man intended to be arrested, it is unsettled whether the offence be *murder* or *manslaughter*, *Mary Ady's case*.....208

4 A mother-in-law, on perceiving a fault committed by her daughter-in-law, a child of ten years of age, in some work she was doing, threw the child's stool at her and killed her, and then concealed her death, and hid the body; this seems to be only manslaughter, *Hazel's case*.....368

5 For where a shepherd, being angry with his boy for letting some sheep escape, threw, in his passion, a stake at him, with some violence, at the distance of about 8 or 10 yards, which killed him; this was ruled to be manslaughter only, *Wigg's case*.....379

MILLED MONEY.

1 The words "*Milled Money*" have no reference to *the edging* on the

real coin, which is properly called *graining, Bunning and Pendergrast's case*.....621

MISNOMER.

1 To a plea of *misnomer*, which may be pleaded *ore tenus*, the Clerk of the Araigns may reply, that the prisoner is known as well by the *one* name as the other, *Dean's case*, 476

MONEY.

1 Guineas, dollars, or Portugal pieces, are not within the meaning of the words "goods, wares, or merchandises" in the statute 24 Geo. II. c. 45. against stealing to the amount of 40*s.* on a navigable river, *Leigh's case*..52

2 *Money* is not within the meaning of the statutes 3 Will. & Mary, c. 9. and 5 Ann, c. 31. against the buyers or receivers of stolen *goods* or *chattels*, *Guy's case*.....241

3 *Bank-notes* are not within the statutes against the receiving of stolen goods, *Sadi* and *Morris's case*. 468

4 *Bank-notes* are not within the meaning of the statute 2 Geo. II. c. 25. which makes it a capital offence to forge, or knowingly utter any receipt either for *money* or goods, *Harrison's case*.....182

MOULD.

1 A *mould* on which is made and impressed the figure of one of the sides of the silver coin is comprehended within the words *tool* or *instrument* in the latter clause of the 8 and 9 Will. III. c. 26. *Lennard's case*.....90

2 A mould having only the convex parts of the stamp of a shilling, the head being inverted and the letters reversed, is a mould on which is made and impressed the similitude and stamp of the current coin, *ibid.* 92

MURDER.

1 Murder is where a person of sound understanding unlawfully kills another of malice, aforethought, either express or implied. If the malice be express, the fact is with the jury; if implied, the fact is with the court, *Hazel's case*.....383

2 Accidental homicide cannot be murder, except it happen in prosecution of some illegal act, *Hodgson's case*.....6

3 The bodies of executed murderers are, by the common law, at the disposal of the king, *Hall's case*....21

4 But by 22 Geo. II. c. 37. the judge who tries a murderer may, after sentence of execution pronounced, order the body to be hung in chains, 22, *notis.*

5 On a conviction of petty treason, the judgment for dissecting and anatomizing, and the time of execution, ought to be pronounced, although murder only is mentioned in the statute 25 Geo. II. c. 37. 22, *notis.*

6 But in murder, except in those cases which are within the statute, the time and place of *execution* are by law no part of the judgment, 22, *notis.*

7 In cases within the act, judgment shall be given for dissecting and anatomizing only, and not hanging in chains.....22, *notis.*

8 A person who has by a false and malicious accusation of a capital felony procured an innocent man to be convicted, and who is *executed* in consequence of such conviction, cannot, it is said, be indicted for *murder*, *Macdaniel's case*.....44

9 So it is doubted whether death occasioned by the violent perpetration of a rape be murder? *Ladd's case*.....96

10 If a bailiff be maliciously killed in executing an *attachment* issued by *the county-clerk* in a cause in which *the county-clerk* is plaintiff, it is murder, for such attachment is legal, *Richard Baker's case* 112

11 So if a known officer be killed while he is endeavouring to arrest a man, upon *a blank warrant* it is murder .....115, *notis.*

12 A woman who, in a transport of passion, kills a peace officer who is about to take the man she cohabits with to prison, under a warrant which turns out to be illegal, is guilty of murder, *Mary Ady's case,* 208

13 Murder committed at the *Cape of Good Hope,* or any where beyond the seas, may, by the 33 Hen. VIII. c. 23. be tried by special commission in any county in England, *Captain Roche's case* 134

14 The death of an apprentice caused by the premeditated negligence, excessive correction, or cruel usage, of the master, is murder, *Stephen Self's case* 137

15 Murder committed at sea 100 yards from the shore, by a stroke given from the land, though at the distance of 200 yards, shall be tried by the High Admiral, *Coombe's case* 388

16 If two persons be indicted for murder, the one as principal in the first degree, and the other as being present aiding and assisting to commit it, the jury may find the principal in the first degree not guilty, and convict the principal in the second degree, *Taylor and Shaw's case* 360

17 But it is said that if five men be indicted for murder, and it appear that the murder was committed by one of them, and not by the other four, and it is not ascertained by the special verdict which of them it was who committed the offence, all must be acquitted, *The Ipswich case*..388

18 A person indicted for petty treason and murder, combined in one count, may be found guilty of the murder and acquitted of the treason, *Radbourne's case* 457

19 On the trial of an indictment for murder, *the death* of the person charged to have been killed must be positively proved, and cannot be collected from the circumstances, *Hindmarsh's case* 569

MUTUS ET SURDUS.

1 The defect of being deaf and dumb may, as to the trial of an offender, be obviated, if he can communicate and receive ideas, through the intervention of others, by signs and tokens, *Jones's case* 102

2 Whether a prisoner stand mute, obstinately, or by visitation of God, is a fact triable *instanter* by a jury to be returned for that purpose, and if found obstinate the trial in chief may proceed, *Mercier's case,* 183

3 So if the jury return that the prisoner is deaf by the visitation of God, the trial may proceed, and on conviction the prisoner be sentenced to transportation, *Steele's case*...451

4 And by 12 Geo. III. c. 20. it seems that such a convict may be executed.....453, *notis.*

N.

NAME.

1 The *name* of the owner of the house is essential in an indictment for *burglary,* and in an indictment for stealing in the dwelling-house, *White's case* 252

2 A corporation must prosecute by

the name of *incorporation;* the addition of such *name* as *a description of the persons* of which the corporation is composed is not sufficient in an indictment, *Patrick and Pepper's case* 253

3 A variance in the name of the person from whose dwelling-house goods are stolen to forty shillings value, as "*Sarah Luns*," instead of "*Sarah London*," is fatal to the *capital part* of the *charge*, *Woodward's case*.....253, *notis.*

4 In an indictment on 3 & 4 Will. and Mary, c. 9. for robbing lodgings, the name of the person *by whom* the lodgings were let must be stated, *A. Pope's case*.....336

5 But in an indictment on 45 Geo. III. c. 89. for putting away a forged Bank-note, with intent to defraud the Bank, it is not necessary to state *the names* of the persons to whom the notes were put away, *Holden's case*.....1019

6 If property be stolen, when it resides in *trustees* who are not *incorporated*, the indictment must state the *names* of the trustees, and the *nature* of the trust, *Patrick and Pepper's case*.....253

7 A *peer of Ireland*, unless he be a *Lord of parliament*, cannot sue or prosecute by his *name of dignity*, but must be described by his *proper name*, with the addition of his *degree* and *title*, *Graham's case*....547

8 But where an indictment for larceny laid the goods stolen to be the property of "*Victoire Baroness Turkheim*," and it appeared that she always went by *that name*, though her real name was *Selina Victoire*, and *Baroness Turkheim* her title only, it was held good, *E. Sull's case*.....861

9 A letter signed by two initials, as *R. R.* is a letter "*without a name* subscribed thereto," within the meaning of the 9 Geo. I. c. 22. *Robinson's case*.....749

NAVAL STORES.

1 A person convicted of concealing naval stores, or of having them unlawfully in his custody, may receive the *corporal punishment* directed by 17 Geo. II. c. 40. although he be ready, and offer to pay the penalty of 200*l.* imposed by the 9 & 10 Will. III. c. 41. *Bland's case*...595

See also 39 & 40 Geo. III. c. 89. 596, *notis.*

NAVY BILL.

1 The name of the holder of a navy bill, signed on a proper receipt stamp, does not, on the face of it, purport to be *a receipt for money*, within the statute 2 Geo. II. c. 25. and 7 Geo. II. c. 22. *Hunter's case*, 624

NAVY BOARD.

1 If a person employed by the executors of a public accountant to settle the account of the testator with government, procure fabricated vouchers and deliver them to the Navy Board, in order to exonerate the estates of the testator from an extent, it is a forging and uttering within 2 Geo. II. c. 25. *Thomas's case*, 877

NAVIGABLE RIVER.

1 By 24 Geo. II. c. 45. whoever shall steal any goods, wares, or merchandises of the value of forty shillings, in any vessel on a navigable river, shall suffer death without clergy.....52

2 Dollars, or Portugal money not current by proclamation, are not *goods*, &c. within the meaning of this statute, *Leigh's case*.....52

3 Stealing goods from on board a barge aground in *Limehouse Dock*,

is not stealing on a *navigable river*, within the statute, *Pike's case*..317

O.

OATH.

1 An oath in which GOD is invoked as a witness, or as an avenger, is to be accommodated to the religious persuasion which the swearer entertains of a Supreme Being, 55, *notis.*

2 A Mahometan, therefore, may be sworn on the *Coran*, in prosecution of a capital offence, *Morgan's case* 54

3 A false oath taken in a prerogative court for the purpose of obtaining a marriage license is an indictable offence, *Alexander's case*.....63

4 As if a man make oath to obtain a license to marry *A. B.* " to which " he knows no lawful impediment," and he knew at the time that *A. B.* was a married woman, *Woodman's case* .....64, *notis.*

5 No witness whatever can give testimony in a court of justice, except upon oath, *Powel's case*.....110

OFFENSIVE WEAPON.

1 What shall be considered as an *offensive weapon*.....342, *notis.*

2 An indictment on the 7 Geo. II. c. 21. must state that the assault was made with an offensive weapon, *William Thomas's case*.....330

3 A common whip is not an offensive weapon within the meaning of the Black Act, *Fletcher's case*.....23

ORDER.

1 Forging an order in the name of a *silversmith* for the re-delivery of plate from *Goldsmiths' Hall*, in these terms, " Please to deliver my " work to bearer, *L. B.*" is an order within 7 Geo. II. c. 22. although neither the pieces of work, nor the weight of each is, as usual, stated, *Jones's case* 53

2 A forged order on a banker for payment of money, purporting to be made by a person who kept cash at the house, is within the statute, though made in a fictitious name, or in the name of a person who had no authority to draw on this house, *Lockett's case*..... ...94

3 But a *note*, in the name of an overseer of the poor, to a shopkeeper "*desiring* him to let the prisoner have a pair of stockings, &c. which he would see him paid for," is neither *a warrant* or an *order* within the statute, but a mere *request*, with which the shopkeeper might have refused to comply, *Mitchell's case*, 95, *notis.*

4 So a note, " Please to let the bearer *G. W.* have twelve barrels of tar, and in so doing you will oblige yours, &c." is not within the statute; the person whose name was forged to it, not being the owner of any tar, or having any authority to make such order; for in such case no other person's *right* is usurped, *Williams's case*..... 114

5 So a note " Please to send 10*l.* by the bearer as I am so ill I cannot wait on you," is not *an order* for money, but a mere letter, rather requesting a loan, than ordering payment of money; no *right* to make such an order appearing on the face of it, *Ellor's case*.....323

6 It must appear that the person whose order it purports to be, had authority to make it, and therefore an indictment stating an order to deliver goods, purporting to be signed by one who was alleged to be *the servant* of the owner, without shewing that *he* had authority to

make such order is bad, *Clinch's case*.....540

7 An order purporting to be the order of a seaman on his prize-agent "to pay all my proportion of prize-"money due for my services on "board the G." is within the statute 7 Geo. II. c. 22. provided it do not, *on the face of it*, appear void by 32 Geo. III. c. 34. though it would *in fact* have been so had it been genuine, *M'Intosh's case*.....883

8 But a *draft* on a banker, "Pray pay to *A B.* or bearer, six pounds, yours, *H. T.*" though in a fictitious name, assumed by the party at the time, for the purpose of fraud, and to avoid detection, is within the statute, though credit was given to *his person* for the goods he got for the draft, *Shepherd's case*..... .226

9 A forged draft on a banker, or a bill of exchange,, may be laid in the indictment as "*an order for payment of money*".....*ibid, notis.*

10 All orders for the delivery of goods to be within 7 Geo. II. c. 22. must *purport* to be the order of the owner of the goods, or of some person who has or claims an interest in, or who has or assumes a disposing power over such goods, and takes upon him to transfer the property or custody of them to the person in whose favor such order is made, 544

P.

PAID NOTE.

1 If a Bank-note be paid, and cancelled in the usual form, and placed on the file, and a clerk of the Bank take it off the file, conceal the cancel mark, put it into circulation, and embezzle its produce, he may be indicted on 15 Geo. II. c. 13. for stealing it as part of the *effects* of the Bank, *Bakewell's case*....943

2 So if a person steal the *paid notes* of a country bank, while on their way from the London bank, and put them fraudulently into circulation, he may be indicted for stealing them on 2 Geo. II. c. 25. as promissory notes, although they were never reissued by the country bank, *Clarke's case*.....1036

3 So if such paid notes be lost, and the finder alter the *place of payment*, and by that means obtain money for them, he may be indicted for it as a forgery, *Treble's case*.....1040

4 So a *paid note* of a country bank sent by the post from London for the purpose of being reissued, but which is secreted by a facer of letters at the post-office is a security within 7 Geo. III. c. 50. s. 1. *Ranson's case*.....1090

PARDON.

1 If a general pardon come out between the time of arraignment and trial, prisoners shall have the advantage of it, although they neglect to plead it at the time of trial, *Haines's case*.....40

2 On allowing a pardon which has been neglected to be taken advantage of in due time, the Court will order the prisoner to pay the prosecutor his costs, *Haines's case*..41

3 The king's *sign-manual* cannot be pleaded as *a pardon;* for a pardon must be pleaded *sub pede sigilli*, *Gully's case*.....98

4 The form of allowing a pardon, and the effect of performing the conditions of it with respect to being found at large after sentence of transportation, *Patrick Madan's case*.....223

5 See a difference of opinion upon this subject in *Aickles's case*.....390

6 See also *Madan's case*.....74

7 A pardon not only remits the punishment, but restores the convict to his *plenam et liberam legem, Reilly's case* 455

8 A pardon restores a person convicted on the 31 Geo. II. c. 10. for taking *a false oath* to obtain probate of a seaman's will, to his *competency;* for a pardon not only clears the offence itself, but all disabilities incident to it, *T. Reilley's case*...454

PAUPER.

1 Where an allowance is made to a pauper weekly, it is due at the beginning of the week, *Fearnley's case* 426

PERJURY.

1 On an indictment for perjury in an answer in Chancery, it is sufficient to prove that the *jurat* was subscribed by the master, and that the name subscribed to the answer is the hand-writing of the defendant, without proving that the defendant was actually the person who swore that answer; for the order of the Court, that "all persons shall *sign* their answers" was intended to facilitate the proof of perjury, and a *jurat* attested by the proper person authorized to take such oath is proof of its having been sworn by the person whose name is signed; at least so far as to put it upon him to shew that he was personated, *John Morris's case*.....50

2 The law of this case confirmed by Lord Ellenborough, in Mich. Term 51 Geo. III. *Rex* v. *Benson*, 2 Camp. 508

3 By 31 Geo. II. c. 10. s. 24. to take a *false oath* in order to obtain letters of administration to a seaman's effects, is a capital offence.....327

4 In an indictment on this statute it must be proved, that the prisoner is the *same person* who took the oath, *Rex* v. *Thomas Brady*.....327

5 Taking a *false oath* in Doctors' Commons, for the purpose of obtaining a *marriage license*, is an offence indictable in the courts of common law, *Joseph Alexander's case*.....63

6 In an indictment for perjury at *common law*, the words "falsely, "maliciously, wickedly, and cor- "ruptly," imply "wilfully;" but on the 5 Eliz. c. 9. it must be expressly laid to have been *wilfully* committed, *Cox's case*.....71

7 Perjury may be assigned on an oath, by which the party does not swear *positively*, but only that he *believes* the fact he attests to be true, *Pedley's case* 242

8 If *A.* be convicted of *false swearing*, and *B.* be afterwards indicted for *the subornation*, the record of *A.'s* conviction is not sufficient to shew *his* guilt, but it must be again regularly proved before *B.* can be convicted, *Macdaniel's case*, 455, *notis.*

9 An indictment for perjury, laying the offence to have been committed "at *the Guildhall* of the city of *London*," is bad, *Harris's case*, 800

PERSON.

1 By 48 Geo. III. c. 129. the offence of stealing property from *the person* of another without such a degree of force as will amount to robbery, is substituted instead of the capital offence of stealing *privily from the person* by 8 Eliz. c. 4. which is repealed.....444-1047

2 This statute extends the offence to

aiders and abettors, which 8 Eliz. did not, *Rex* v. *Pearce*.....1046

PERSONATING.

1 By 31 Geo. II. c. 22. s. 77. (which extends as well to stocks and funds thereafter to be established, as to those then established,) if any person shall personate any proprietor of stock in the public funds, thereby transferring or endeavouring to transfer the stock, or thereby receiving or endeavouring to receive the money as if he were the proprietor thereof, shall be guilty of felony, without Clergy 434

2 To obtain and indorse a dividend warrant at the Bank in the name of a stockholder, is personating a proprietor, and *thereby* endeavouring to receive the dividend, although no attempt whatever be made to receive the money at the pay-office, *Francis Parr's case*.....434

3 See also *Brady's case* 327

4 If a female servant procure a man to personate her master, and in that character to solemnize a marriage with her for the purpose of afterwards raising a specious title to the property of her master, it is a conspiracy for which the parties may be indicted, *Robinson and Taylor's case*.....37

POSSESSION.

1 In larceny the question always is, whether the prosecutor intended to part with *the property*, or only with *the manual custody* of the thing delivered; for if he parted with *the property* by whatever fraudulent means he was induced to give the credit, it is not felony, *Walsh's case*, 1054

2 If the *property* be not parted with, the *right of possession* will follow the property, although the *manual possession* is parted with, *Hudson* v. *Hudson*.....522

3 But if the bare *possession* only be delivered, the question will be, whether the delivery was by way of *charge*, or as a general *bailment*, or for some *special purpose*, *Walsh's case*.....1054

4 Thus if a person *sell* a horse to another, and deliver it to the purchaser *upon credit*, and he ride away with it, it is no felony; for the owner having *given credit*, parted with his *property* in the horse, *Justin Harvey's case*.....467

5 So if several sharpers inveigle one to bet with them, and, after suffering him to win, contrive to strip him of a large sum on the event of a bet, if he *parted with the property* under an idea that it had been fairly won, it is no felony, though the Jury find it to have been a preconcerted scheme to get his money, *Nicholson's case*....610

6 So where the prisoner, with intent to defraud, ordered a tradesman to send him goods to be paid for on delivery, and afterwards gave the servant who brought them, BILLS in payment which were good for nothing, it is no larceny; the owner's servant (though his master did not intend to give the prisoner credit,) having *parted with the property* by accepting such payment as was offered by the prisoner, *Park's case* 614

7 So where a person giving credit to the servant of a neighbour, who falsely pretended that her mistress wanted silver for half a guinea, which she would send in return, gave her the silver with which she ran away; for it was a loan of the silver upon the faith that the amount would be repaid, and so *the property* was parted with, *C. Coleman's case*, 308

8 But inducing a person to deliver twenty guineas and four doubloons by way of *pledge* for the return of a counterfeit jewel pretended to be found and of which the party was to have half the value on his returning it, and to receive from the prisoner the guineas and the doubloons again; the owner by the delivery under these circumstances does not part with his property, *Moore's case*.....314

9 For in ring-dropping cases, if the person duped take the ring and deposit money, or goods as *a security* that he will return it on receiving his proportion of its supposed value, and the ring-dropper convert the money or goods, they are feloniously taken from *the possession* of the owner, *Patch's case*.....238

10 So if a man hire a horse for a day to go to a particular place, promising to return it in the evening, but instead of so doing he goes immediately to another place and feloniously sells it, the delivery does not *dispossess* the owner of the property, *Rex* v. *Pear*.....212

11 So the delivery of a post-chaise to a person who pretends to hire it for the purpose of making a tour, and does not return it for a year, and then, on being apprehended, gives no account of what has become of it, does not alter the ownership, *Semple's case*.....420

12 The possession to constitute larceny must be a *peaceable possession*, *Mrs. Phipoe's case*.....324

13 The owner of a bank-note does not part with his right of *possession* of it by inclosing it in a letter and delivering it to a letter-carrier to carry as directed, *Hassel's case*....4

14 A tradesman does not part with *legal possession* of property left with a customer to look at, if no bargain has been made for the sale of it, although the price is mentioned, *Sharpless and Greatrix's case*.....92

15 And of course property is not parted with by a tradesman delivering goods to a customer in his shop to look at, but who instead of purchasing runs away with them, *Chiffer's case*.....526

16 If the person to whom goods are delivered has but the *bare charge* or custody of them, the legal possession remains in the owner, as a shepherd of his master's sheep, a butler of his master's plate, &c.1056

17 So where goods are delivered for a *bare special use* as goods delivered to a guest at an inn, or yarn or silk delivered by a throwster to his servant to be worked up *in his house*, *Silk Throwster's case*.....252, *notis.*

18 So if a banker's clerk have access to the money room on special occasions, and being sent to bring money he take the opportunity of purloining money to his own use, the property so purloined is not parted with by the owner, but still remains in his constructive possession, *Murray's case*..... 344

19 The *property* is not parted with except by delivery, on a *legal*, real, *bona fide*, *contract* between the parties, *Tunnard's case*.....214, *notis.*

20 The delivery of goods by *a master* to *a servant*, for the purpose of their being carried to a customer, does not take the *legal possession* of such goods out of the master, *Wm. Bass's case*.....251

21 Money obtained by the practice of *ring-dropping*, does not divest the owner of the right of possession, *Owen's case*.....572

22 As where it was agreed between the ring-dropper and the prosecutrix, that on her *depositing* a hundred pounds with him, a third person, in

whose hands the ring had been placed, should deliver the ring to her as *a security*, that he would bring her the next morning the 100*l.* back again, together with 120*l.* more, as her half of the value of the ring; and he went off with the 100*l.* the ring not being worth 5*s.*; it was held a felonious taking from the possession of the prosecutrix; for her delivery of the 100*l.* to him was on the *particular condition*, that he was to restore it the next morning, *Watson's case*.....640

23 For the delivery must be with intention to part with the property before the owner can be dispossessed of it; and therefore, where, upon an agreement with the prisoner, to discount a bill, it was delivered into his hands to satisfy himself of its goodness; but the owner not intending to trust him with it without receiving the money, sent his clerk to follow the prisoner to the place where the money for it was to be paid, and directed him not to leave the prisoner without the money; but the prisoner contrived to elude the vigilance of the clerk, and to run away with the bill; this was held felony, for the owner had not parted with the property, *Aickles's case*. 294

24 So if the owner send goods by his servant, to be delivered to *A.* and *B.* fraudulently procure the delivery of them to himself, he is guilty of felony, in taking them away, for the owner had not parted with the property of them, *Wilkin's case*.....520

25 But both *the possession* and *property* of money, obtained by play, where the owner intended to *receive if he won*, and to *pay if he lost*, is parted with by the owner's putting it down to the stakes and losing them, *Nicholson, Jones, and Chapel's case*, 610

26 The *right of possession* is not changed by a clerk, who had the intire management of his master's cash concerns, taking a bill from the bill-drawer to which he had access, and, of course, the fraudulent conversion of it is larceny, *Chipchase's case*..... 699

27 Stealing money received by a servant, on account of his master, but not put into the possession of the master, is not larceny at common law, for it never was properly in the possession of the master, *Bazeley's case*..... 835

28 Same point, *Waites's case*.....28

29 Same point, *Bull's case*.....841

30 But now, by 39 Geo. 3. c. 85. the *possession* of the servant is the possession of the master, (for which see embezzlement,) *Bazeley's case*, 835

POST-OFFICE.

1 If a *sorter of letters* embezzle a letter containing *a bank-note*, or other *chose in action* mentioned in the 2 Geo. II. c. 25. he may be indicted for stealing the *bank-note*, although *the letter* was *entrusted* to his care, as a servant of the post-office, for it is like a carrier breaking the bale he is entrusted to carry, *Hassel's case*.....1

2 An indictment for larceny to the value of 40*s.* committed in *the Post-Office*, may lay it to be the *dwelling-house* of the *Post-Masters General*, *Hassel's case* 1

3 By 7 Geo. III. c. 50. s. 1. re-enacting more largely the provisions of 5 Geo. III. c. 25. s. 17. it is enacted, that if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters, or in any other business relating to the post-office, shall se-

crete, embezzle, or destroy any letter, &c. which they shall be intrusted with, containing any bank-note, bank-post bill, &c. or by 42 Geo. III. c. 81. any part or parts thereof, or shall steal or take the same out of any letter that shall come to his possession, he shall be guilty of felony without the benefit of clergy.....3, *notis.*

4 A draft purporting to be drawn in *London*, but actually drawn at *Maidstone*, without a *stamp*, contrary to 31 Geo. III. c. 25. s. 4. is not such *a draft for the payment of money*, as will make a servant of the post-office who steals it out of a letter intrusted to his care, liable under 7 Geo. III. c. 50. s. 1. *Pooley's case*.....887

5 The *security* contained in any such letter may be given in evidence to prove the stealing of the letter, *Pooley's case*.....900

6 The *paid notes* of a country bank are securities within the meaning of the act, and therefore if a facer of letters embezzle a letter containing such notes it is a capital offence, although they have not been reissued, *Ranson's case*.....1090

7 By the 9 Ann. c. 10. s. 40. to open, detain, or delay any letter delivered into any post-office or receiving-house, or into the hands of any letter-carrier, before delivery to the person to whom it is directed, *except by warrant under the hand of* THE SECRETARY OF STATE, incurs a forfeiture of twenty pounds.....3

8 To convict a person employed by the Post-Office on these statutes, it is not necessary that he should have taken the oath required by 9 Ann. c. 10.....3, *ibid.*

9 A prisoner indicted on the 7 Geo. III. c. 50. as a *charger and sorter* of letters, and acquitted because it appeared he was *a sorter* only, cannot be found guilty, on other counts in the indictment charging him generally, as a *person employed in the Post-Office*, *Shaw's case*.....79

10 A draft drawn by a manufacturer at Birmingham on a banker in London, sent by post and secreted by a clerk in the post-office, may be laid to be a *warrant for the payment of money*, *Willoughby's case*, 226, *notis.*

11 A stamper of letters who secretes letters not containing the securities mentioned in 2 Geo. II. c. 25. but who does not open the letters but detains them merely for the purpose of defrauding the post-office of *the postage*, is not indictable under 7 Geo. III. c. 50. but he may be indicted on the 5 Geo. III. c. 25. s. 19, *Sloper's case*.....81

12 So where a letter-carrier secreted a post-paid letter, with intention, as the Jury found, to deliver the letter, and to keep *the postage*. it was held not to be a stealing within 7 Geo. III. c. 50. s. 2. *Howatt's case*, 83, *notis.*

13 And now by 42 Geo. III. c. 81. the offences in the 5 Geo. III. c. 25. s. 19. are again made felony, 83, *notis.*

14 To secrete a letter containing *money*, is not an offence within the statute 7 Geo. III. c. 50. but the offender may be indicted for the larceny of *the money* at common law; for the statute only applies to the *securities for money* therein described, *Skutt's case*.....106

15 By 7 Geo. III. c. 50. s. 2. "if *any person* shall steal and take from or out of any post-office, or house or place for the receipt or delivery of letters or packets sent or to be sent by the post, any letter or letters, he shall be guilty of a capital felony. But a *servant of the post-office*, who commits this offence, is

not within the penalties of this section of the act, *Pooley's case*...904

16 But a person who under the pretence of being the mail-guard induces the holder of the mail-bags to let them down to him from a window of the post-office by a string, and makes off with them, is within the clause, and he may be indicted for stealing them out of the post-office, *Noah Pearce's case*, 3 *East*,603

17 If a letter-carrier secrete two letters sent by the post on different days, each letter containing half of the same bank-note, it is a capital offence, within 7 Geo. III. c. 50. and he may be indicted "that he having the said *two letters* "containing the said *bank-note*, did "secrete the said letters," &c. *Moore's case*.....575

And see 42 Geo. III. c. 81.....578, *notis.*

18 An indictment on the 7 Geo. III. c. 50. s. 2. which enacts, "that "whoever shall rob any mail of any "letters, packet, bag, or mail, shall "be guilty of a capital offence," must lay the robbery in the very county where the mail was robbed, and not in the county where the prisoner was in possession of it, *Thomas's case*.....634

19 But now by 42 Geo. III. c. 81. s. 3. the offence of robbing a mail may be prosecuted either in the county in which the offence is committed, or the offender apprehended .....637—909, *notis.*

20 By 52 Geo. III. c. 143. s. 1. the same clause is re-enacted, and also the clause of 7 Geo. III. c. 50. including accessaries both before and after the offence.....909, *notis.*

PRACTICE.

1 On a recognizance to appear, *enter*, and try his traverse, the defendant cannot be tried without *entering* his traverse, except he withdraw his plea, and give the prosecutor notice, *Fry's case*.....111

2 The practice of not calling on a prisoner to defend himself against the uncorroborated testimony of an accomplice, is matter of *discretion with the Court*, and not *a rule of law*, *Durham's case*.....478

PRISON.

1 A common gaol, the entrance to which is through the dwelling-house of the gaoler, and in which those prisoners who could pay for a bed, were occasionally allowed to sleep, is *a house* within the meaning of 9 Geo. I. c. 22. and, therefore, if a prisoner set fire to any part of *the prison*, it is arson, *Donovan's case*.....69.

See Escape.

PRIVATELY STEALING *from the Person.*

1 The 8 Eliz. c. 4. which takes away the benefit of clergy from such as shall be *found guilty* of privately stealing from the person, does not extend to accessaries before or after the fact, *Bayne's case*.....7

2 And therefore the capital part of the offence is confined to the person only who takes the property, *Murphy's case*.....266

3 But this is a fact for the consideration of the Jury under all the circumstances of the case, *Sterne's case*.....473

4 The offence of privately stealing from the person cannot be committed on a person who has rendered himself senseless by intoxication, *Gribble's case*.....240

5 But if the prosecutor was made drunk by the artifice of the prisoner, it is within the statute, *Branny's case*.....241, *notis.*

6 But it does protect a prosecutor,

who, being drunk, picks up a girl, and falls asleep at her lodgings, *Kennett's case*.....788

7 Therefore not to a hackney-coachman who falls asleep in his coach while waiting for his fare, at an unseasonable hour of the night, at the door of a common and notorious brothel, *The case of Reading and Jones*.....240, *notis.*

8 But if a person steal goods or money from the person of a captain of a ship while he is *asleep* in his cabin, he is guilty of a capital offence within the 8 Eliz. c. 4. *J. Thompson's case*.....443

9 So also to steal privately from the person of a waggoner while *asleep* in the stables of an inn where his horses are put up to feed, is a capital offence within 8 Eliz. c. 4. *Willan's case*.....495

10 But the 8 Eliz. c. 4. is now repealed by the 48 Geo. III. c. 129. which enacts, that every person who shall feloniously steal any money, goods or chattels, from *the person* of any other, whether *privily* or not; but without such *force* as constitutes *robbery*, or who shall aid or abet therein, shall be transported not less than seven years, or imprisoned not exceeding three years, as the Court shall see fit, *Thompson's case*.....444, *notis.*

PRIVATELY STEALING *from the Shop.*

See Shoplifting.

PROCESS.

1 Process of *attachment* from a county court, issued and signed by the county-clerk, although it be in *his own cause*, is legal process, *Baker's case*.....112

2 So a writ of *Habere facias possessionem* is legal, although it be, by interlineation, directed to *A.* and *B.* as special officers, to execute it, after it is sealed, but before it is taken from the sheriff's office, *John Harris's case*.....929

PROPERTY.

1 The coach-glass of a gentleman's coach standing in a coach-master's yard, may be laid to be the property of the coach-master, *Taylor's case*.....356

2 So if the linen which a laundress has to wash, belonging to other persons, or the sheep which an agistor takes in to feed, be stolen, they may be respectively laid to be the property of the laundress or the agistor, *Deakin's case*....862

3 So the goods, which a stage-coachman is entrusted to carry, may, as against a thief who steals them, be laid to be the property of the coachman, *Deykin and Smith's case*, 862

PURPORT.

1 The word purport means the substance of an instrument as it appears on the face of it to every eye, *Reading's case*.....590

2 An indictment, therefore, averring that a draft, directed to "*Ransom, Moreland, and Hammersley*," PURPORTED to be directed to "*Lord* "*George Kinnaird, William More*-"*land*, and *Thomas Hammersley*," is bad, *Gilchrist's case*.....657

3 The name of the holder of a navy bill, signed on a proper receipt stamp, and affixed to the navy bill, does not, on the face of it, *purport* to be *a receipt for money*, but it must, by proper averments, be shewn to be a receipt, *Hunter's case*.....624

4 So the word *settled* to a bill of parcels under 40*s.* does not of itself purport to be *a receipt*, although the stamp Act 35 Geo. III. c. 55, s. 7. states that the word *settled*

to any bill above 40*s.* shall be considered *a receipt*, liable to stamp duty, *Thompson's case*.....910

5 An allegation that a forged note was signed by *the person* whose name it purports to bear, is bad; it should be "*purporting* to be signed by such person," *Carlon's case* 661, *notis.*

6 But an indictment for forgery is good, although the *purport* of the instrument set out is not described, *Reeves's case*.....808

7 And per BULLER, *Justice*, perhaps, it is the better way to draw an indictment for forgery without setting out the purport of the instrument, *Gilchrist's case*.....657

See Averment.

R.

RAPE.

1 *Qu.* If death ensue from the violence with which *a rape* is committed, whether the offender can be indicted for *murder*, *Ladd's case*, 96

2 The testimony of an infant under fourteen years of age, cannot, in rape, or any case, or under any circumstances, be received, except on oath, *Powell's case*.....110

3 And therefore, on a charge of rape, the testimony of the child's mother, to whom the child, of seven years of age, had told the circumstances, cannot be received, but if the child be acquainted with the obligation of an oath, she may be sworn, *Rex* v. *Brazier*.....199

4 But an infant of any age who possesses sufficient knowledge of the nature and consequences of an oath, may be sworn.....430

5 And if a person do not possess that knowledge, the trial may be postponed until the party be properly instructed upon the subject....430, *notis.*

6 In rape, *the deposition* of the girl, though under twelve years of age, taken before and *signed by* the committing magistrate, may, after her death, not only be read in evidence, although it was *not signed by her*, provided she was *sworn*, and competent to take *an oath*, but is of itself sufficient evidence of the prisoner's guilt, *Fleming and Windham's case*.....854

REALTY.

1 A commission to settle the boundaries of *a manor* is an instrument savouring of *the realty*, and therefore cannot be the subject of larceny, *Westbeer's case*.....13

RECEIPT.

1 A *scrip receipt* not filled up with the name of the *subscriber*, is not a receipt for money within the statutes against forgery, *Lyon's case*, 597

2 But a *scrip receipt* properly filled up, is a receipt for money, *Reeves's case*.....808

3 The signatures on a navy bill, do not, of themselves, purport to be a receipt for money, *Hunter's case*.....624

4 And by 36 Geo. III. c. 74. whether filled up or not, *Reeves's case*...808

5 By the 35 Geo. III. c. 55. s. 7. for imposing a stamp duty on receipts, every note, memorandum, or writing, signifying any debt or demand being *settled*, shall be deemed *a receipt*, *Thompson's case*.....911

RECEIVER.

1 A receiver of stolen goods may be tried for the *misdemeanor*, though the principal might have been ap-

prehended and brought to justice, *Wilkes's case* 103

2 In an indictment against a receiver of stolen goods, it is sufficient to state that the principal "was tried "and *convicted*," without going on to shew that *judgment* was passed upon him, or how he was delivered, *Hyman's case* 925

3 An erroneous attainder of the principal is sufficient against the receiver, until it is reversed, *Baldwin's case* .....928, *notis.*

4 Money is not within the words "goods and chattels," in 3 Will. and Mary, c. 9. and 5 Ann. c. 31. against receivers of stolen goods, *Guy's case* 241

5 Although the receiver be tried on the same indictment with the thief, *Davidson's case* 242

6 Bank-notes are not goods and chattels within the statute against receivers of stolen goods, *Morris's case* 468

7 The principal thief may be admitted a witness against the receiver, on the 22 Geo. III. c. 58. *Haslam's case*.....418, 927

8 An indictment against a receiver of stolen goods, on 3 Will. and Mary, c. 9. and 4 Geo. I. c. 11. must shew that the principal was *convicted*, but need not shew that *judgment* was passed upon him, *Hyman's case* 925

RECORDS.

1 By 8 Hen. VI. c. 12. s. 3. if any record, &c. of the King's Courts at Westminster, be stolen, &c. or avoided so that any judgment is thereby reversed, the offender shall be guilty of felony.....12

RESTITUTION.

1 The statute 21 Hen. VIII. c. 11. which restores goods to a prosecutor on conviction of the person who took them away, extends only to a felonious taking, and not to a fraudulent obtaining, *Deveaux' case*, 585

2 Trover to recover stolen goods, cannot be maintained against a person who was not in the *actual possession* of them at the time *the attainder* of the felon took place, *Smith* v. *Horwood*.....587

REWARD.

1 A person who receives money as a reward for helping another to stolen goods, cannot be prosecuted on the 4 Geo. I. c. 11. s. 4. if the principal offender die before he is convicted, *Drinkwater's case*.....15

2 The rewards given by different statutes to those who shall apprehend and convict robbers, burglars, and other offenders, do not render them incompetent witnesses, *Rioters' case*, 314, *notis.*

RING-DROPPING.

1 Money or goods obtained by the practice of ring-dropping, is in law a felonious taking of the property from the possession of the owner provided it is parted with as *a pledge* to restore the ring and receive back the property on the restoration of the ring, &c. *Rex* v. *Patch* 238

Same point, *Owen's case*.....572

Same point, *Watson's case*.....640

Same point, *Moor's case*.....316

Same point, *Marsh's case*.....345

See Larceny, Possession.

ROBBERY.

1 To obtain money or goods, by threatening to charge the party with being guilty of sodomitical practices, is robbery, for such a

threat is more intimidating than personal violence, *Jones's case*...139

2 But the money or goods must be obtained against his will, and from a well-grounded fear of losing his character, *Donnally's case*.....193

3 Especially if the imputation be accompanied with a threat of personal violence, as "to fetch a serjeant "and a file of men to take the ac- "cused into custody," although he felt no apprehension of personal violence from the prisoner himself, *Hickman's case*.....278

4 But if *A.* and *B.* with intent to rob *C.*, accost him, with a peremptory inquiry what money he has got, to which *C.* replies, "*I have only* "*two-pence*," and one of the assailants say, "*Do not take that*," and immediately goes away, and the other robs *C.*, and the prosecutor is unable to say which of them refrained, it goes to the acquittal of both, *Richardson and Greenow's case*.....387

5 The crime of robbery is complete the moment the property is *taken*; and therefore the immediate redelivery of it by the robber to the person robbed, will not purge the offence, *Peat's case*.....228

6 But the property must be taken immediately upon *the threat* being made, and while *the fear* which the threat creates continues; and, therefore, if the property be not delivered until after the fear has subsided, whether that fear be of loss of life, of personal injury, or of *character*, it is no robbery, *Jackson's case*.....193, *notis.*

7 And of course it cannot be robbery if the party assaulted part with his property without any apprehension of danger, either to his person or his character, but merely with a view to inculpate the offender, *Reane's case*.....616

8 If a bailiff needlessly handcuff a prisoner under pretence of carrying him to prison with greater safety, but with a real view, by such violence, to extort money from him, he is guilty of robbery, *Gascoigne's case*.....280

9 To snatch a bundle from the hands of another, so that no struggle be made to keep hold of it, is not a taking with such a degree of force and violence as will constitute the crime of robbery, *Baker's case*..290

10 Several cases to the same effect cited, in which it appears that unless there be some struggle to retain the property, or force used to obtain it, the violence is not sufficient.....291, *notis.*

11 To snatch an ear-ring from a lady's ear, thereby tearing the ear, is sufficiently *violent* to constitute robbery, although the *asportation* be only from the *ear* to the *curls of her hair*, *Lapier's case*.....320

12 The word *rob*, in its legal acceptation, always includes the idea of *force and violence*, *Trapshaw's case* 427

13 An indictment for robbery must state the assault to have been feloniously made, *Randall and Pelfryman's case*.....563

14 Robbery must be proved to have been committed in the very county laid in the indictment, *Thomas's case*.....634
But see 42 Geo. III. c. 81, as to robbing a mail.....578

15 To constitute robbery, the property taken must be of *value to him*, and in the *peaceable possession* of the owner at the time it is taken, *Mrs. Phipoe's case*.....673

16 The fear necessary to robbery, cannot be imparted by a threat to send for a constable to take the party before a magistrate, and from thence to prison; for such a threat ought not so to alarm any mind as to induce the person to part with his property, *Knewland's case*...721

S.

SCOTCH BANK-NOTES.

1 A forged writing, purporting to be a writing obligatory, drawn at *Aberdeen*, by the cashier of the Banking Company there, is not within the 2 Geo. II. c. 25. for the statute expressly excludes *Scotland*, *Dick's case* 69

And see 5 Geo. III. c. 49. as to the circulation of Scotch bank-notes, 68, *notis*.

SCOTCH COVENANTER.

1 May give evidence in criminal prosecutions, by holding up his hand and repeating the form of oath his religion requires, without kissing the book, *Meldrone's case* 412

2 So a Scotch covenanter may be sworn as a *juryman* in the same way, *Walker's case* 498

SCRIP RECEIPT.

1 A scrip receipt, not filled up with the name of the subscriber, is not a receipt for money within the statute 2 Geo. II. c. 25. and 7 Geo. II. c. 22. *Lyons's case* 597

2 But if filled up, it is then a receipt for money within those statutes, *Reeves's case* 808

3 And by 36 Geo. III. c. 74. a receipt for any of the contributions levied by that Act, is the subject of a capital forgery,—"whether with or "without the name or names of "any person or persons being inserted therein as the contributor "or contributors." *Reeves's case*, 808

SEAMEN.

1 By 31 Geo. II. c. 10. to personate, or assume the name or character of any officer, seaman, or other person entitled to wages, pay, prize-money, &c. or his executor, administrator, wife, relation, or creditor, in order to receive his wages, &c. or to forge any power or authority whatsoever for that purpose, or (by 9 Geo. III. c. 30. s. 6.) to utter the same, &c. is felony without clergy 329

2 On an indictment on this statute for taking *a false oath* to obtain administration to a seaman's effects, in order to receive his wages, it is necessary to prove directly and positively that it was the prisoner who took the oath, *Brady's case*.....327

3 A person convicted on this statute for taking a *false oath* to obtain letters of administration, who is pardoned before judgment, is a competent witness against the person who suborned him to take such oath; for by the allowance of the pardon he is restored to his former competency and credit, *Reilley's case* 454

4 This statute applies only to such seamen as belong to King's ships, *Gibson's case* 448

5 By 49 Geo. III. c. 123. s. 13. to forge or assist in forging any order or certificate, for the purpose of receiving prize-money due to any petty officer or seaman in the King's service, or knowingly to utter the same, is a capital offence 1097

6 A wife who by the incitement of her husband utters, in his absence, any such forged order, &c. may be convicted as a *principal* on the above statute, notwithstanding the coverture; and her husband may be in the same indictment, charged and convicted as an accessary before the fact, at common law, *Rex* v. *Morris and his wife* 1096

SERVANTS.

1 If a master deliver to his servant money or goods, for a special purpose, and he converts the same to his own use, it is felony, and *Watson's case* to the contrary, held not to be law, *Rex* v. *Wilkins*.....520

2 So where a master delivers bills to his clerk, with directions to send them to his bankers, instead of which, he converts them to his own use, *Rex* v. *Paradice*.....523, *cited.*

3 So if goods be delivered to a porter to carry to his master's customer, and he stops by the way, opens the parcel, and sells part of its contents for his own use, *Bass's case*, 251

4 So if money be delivered to a clerk with directions to carry it to a particular person, who was afterwards to give the master bills for the amount, but instead of so doing, the servant applies it to his own use, it is felony, *Lavender's case*, 870, *cited.*

5 So if the servant of a corn-factor be sent with his master's barge, to receive corn from a ship, the cargo of which his master had previously purchased, and he goes away with, and converts to his own use the corn so loaded into his master's barge, it is felony, *Spear's case*, 825

6 So although the servant separate part of the cargo from the rest, *on board the ship*, and carry away the corn so separated *in another barge*, yet that is a taking from the possession of the master, and felony, *Abrahat's case*.....824

7 But if the master never had either the actual or constructive possession of the property taken on his account by his servant, the conversion of it to his own use is not felony, *Waite's case* 28

8 As where a banker's clerk receives money or bills at the shop counter, but instead of putting them into his master's drawer, he puts them into his own pocket, and converts them to his own use, *Bazeley's case*...835

9 But now by 39 Geo. III. c. 85. servants or clerks fraudulently secreting property received by them to the use of their masters, are made guilty of felony.....849

10 By 52 Geo. III. c. 63. the 39 Geo. III. is extended to other persons and other things, *Walsh's case*.1082

11 A servant embezzling money received from a customer, to whom the master had given it for the purpose of trying the servant's honesty, is within the penalties of these statutes, *Whittingham's case*.....912

SHIPS.

1 By 4 Geo. I. c. 12. and 11 Geo. I. c. 29. if any owner, captain, master, mariner, or other officer *belonging to any ship*, shall wilfully cast away, burn, or otherwise destroy the same, or in any wise procure the same to be done, to the injury of the underwriter, he shall suffer death, without the benefit of clergy, 47

2 A person who is *accessary* to a felonious shipwreck, is not within these statutes, unless he belong to the ship, *Pow's case*.....45

3 By 26 Geo. II. c. 19. against plundering ships when wrecked, the felony, when committed in *Wales*, may be tried in the next adjoining English county, and to this purpose *Salop* is the next county to *Anglesea*, *Parry's case* 108

4 An accessary *upon land* to a felonious shipwreck afterwards committed on the *high seas* is not within the jurisdiction of the Admiralty, *Pow's case* 45

Same point, *Easterby's case*.....947

5 By 43 Geo. III. c. 113. the statutes

4 Geo. I. c. 12. and 11 Geo. I. c. 29. are repealed, and it is enacted that if any person shall destroy any vessel, or procure any vessel to be destroyed, with intent to prejudice the owner or underwriter, he shall suffer death, and the offenders, whether *principal* or *accessary before the fact*, shall be tried by the Admiralty, or the common law courts, as the offence shall be respectively done on land or at sea.....952

SHOOTING.

1 By 9 Geo. I. c. 22. "if any person "or persons shall wilfully and ma- "liciously shoot at any person in "any dwelling-house or other place; "or if any person or persons shall, "by gift or promise of money or "other reward, procure any of his "Majesty's subjects to join him or "them in any such unlawful act, "every person so offending shall "suffer death without clergy."..64

2 By 43 Geo. III. c. 58. if any person shall wilfully, maliciously, and unlawfully shoot at, or present, point, or level any kind of loaded fire-arms at another, and attempt, by drawing a trigger, or in any other manner, to discharge the same at him, he and his accomplices shall, (if death had ensued, and the homicide would have been murder,) be guilty of felony without clergy, 929, *notis.*

3 Therefore persons *present, aiding and assisting*, although they do not actually shoot, or carry fire-arms for that purpose, are principals within the penalties of these Acts; for this offence is *a new created felony*, and therefore possesses all the incidents of a felony at common law, *Coalheavers' case*.....64

4 Thus where *Sims* held a brood mare belonging to the prosecutor, while *Midwinter* gave her a mortal blow, both were excluded from clergy, *Midwinter* and *Sims's case*, 66, *notis.*

5 A private prosecutor upon the 9 Geo. I. c. 22. has an option to prefer his indictment in such county as he shall think most favourable to the ends of justice, *R. Mortis's case*, 73

6 It is not necessary in an indictment on this statute to state the name of the person in whose house the offence was committed, but if stated, it must be strictly proved, *Durore's case*.....351

7 Wilfully shooting at another. in a man's *own house*, is an offence within the 9 Geo. I. c. 22. *Harris's case*, 929

8 One of three prisoners may be found guilty on an indictment on the 9 Geo. I. c. 22. although they are charged *jointly* with the offence, for several may be guilty of the same act of shooting, as if a string be tied to the trigger, and they all pull at it, *Gibson, Mutton, and Wiggs's case*.....357

9 And this law which was before held good in the *Coalheavers' case*, is now confirmed, *Wells's case*.....360

10 To bring the offence of maliciously shooting at another within the penalties of the Black Act, it must, by 43 Geo. III. c. 58. be committed under such circumstances, that if death had ensued the homicide would have amounted to MURDER, *Gastineau's case*.....417

11 An indictment on 9 Geo. I. c. 22. for shooting at any person, must charge the offence to have been done *wilfully* AND *maliciously*, *Rex v. Davis*.....493

12 It must be proved that the gun or pistol was loaded; but an exclamation from the prisoner, "Let me "pass, or I will blow your brains "out," at the time he fired, the firing wounding the party, either by the wadding or the ball, is sufficient evidence of that fact, *Weston's case*.....247

13 And the gun or pistol must be levelled at the party, *Empson's case*, 224

14 And see the 43 Geo. III. c. 58. by which the objects of 9 Geo. I. c. 22. are enlarged and explained...226, *notis.*

SHOPLIFTING.

1 By 10 & 11 Will. III. c. 23. whoever shall, in any shop, warehouse, coachhouse, or stable, privately and feloniously steal any goods, wares, or merchandise, to the value of five shillings, or shall assist, hire, or command, any person to commit such offence, shall be excluded from the benefit of clergy.

2 But a person who is not present *in* the shop, &c. at the time the offence is committed, but waits at the corner of the street to receive the goods, is not within the statute, *Wild's case*, 17, *notis.*

3 The warehouse of a *Blackwell Hall factor*, where goods are deposited for exportation, and not exposed to sale, as in shops, but are kept inclosed in their respective packages, is not a warehouse within 10 & 11 Will. III. c. 23. *Godfrey's case*..287

4 The coachman's livery-coat is in law considered as goods *belonging* to a *stable*, within the meaning of 10 & 11 Will. III. c. 23. *John Sea's case*, 304

5 Shops and warehouses when they are *mere repositories* for goods, and not *places of sale*, are not within the meaning of 10 & 11 Will. III. c. 23. *Stone's case*.....334

6 Therefore stealing a watch left at the shop of a watchmaker to be mended, or a shirt left at the shop of a draper to be sent to the sempstress, is not within the Act; for though it is a *shop*, yet, *quoad* these articles, it is not a *place of sale*, 334, *notis.*

7 It seems also that *money* is not within the words, "goods, wares, and merchandise," *Guy's case* 241

8 Nor Portugal pieces, *Leigh's case*, 52

SHRUBS.

1 By the 6 Geo. III. c. 36. s. 1. if any roots, shrubs, or plants, be taken or destroyed in the *night time*, to the value of *five shillings*, which shall be growing, standing, or being in any garden ground, nursery ground, or other inclosed ground, the offender, his aiders, abettors, and knowing receivers, may be prosecuted for *the felony*, and transported, *Howe's case* 481

2 But the Court is not bound to pass sentence of transportation under this statute, but may pass any other sentence applicable to a single larceny, *ibid*.....481

3 By 6 Geo. III. c. 48. s. 3. if any root, shrub, or plant, be taken or destroyed, out of the fields, nurseries, gardens, garden grounds, or other cultivated lands, without the owner's consent, the offender shall, on conviction before one justice, forfeit for the first offence, 40*s.* and charges, and for the second offence, any sum not exceeding 5*l.* and charges; and for the third offence, he may be transported for seven years, *Howe's case*.....481

4 But 6 Geo. III. c. 36. s. 1. is not repealed by the 6 Geo. III. c. 48. s. 3. for being passed the same session, they are to be considered *in pari materia*, as composing one law, *ibid.*481

5 The plant called *the sweet bay*, is within the 6 Geo. III. c. 36. the breaking, spoiling, destroying, or carrying away of which in the *night* to the value of 5*s.* from any inclosed ground, is indictable as felony, *Howe's case*.....483

6 Plants and shrubs, as described by 6 Geo. III. c. 48. under the value of 5*s.* are protected from depredation by night and day by this statute 483

SIGN-MANUAL.

1 The sign-manual may be given in evidence on an indictment for returning from transportation, *Maximilian Miller's case* 74

2 The *sign-manual* promising a pardon to a convict, cannot be pleaded as a *pardon*, and therefore the allowance of it will not restore the convict to his competency as a witness, *Gully's case*.....98

SMUGGLING.

1 A commitment on the 19 Geo. II. c. 34. for assisting to rescue smuggled goods, need not state that the prisoner was armed; for to constitute this offence it is not necessary that every individual assembled should be provided with an offensive weapon, *Franklyn's case*....255

2 But, on an indictment for obstructing a seizure, some evidence must be given, to shew that there was proble cause to suspect that the goods seized were liable to seizure, *Shelley's case*.....340, *notis.*

3 The substantive clauses of the 19 Geo. II. c. 34. enumerated, 255, 339

4 There must be a *deliberate* assembling to bring offenders within the penalties of this statute, *Hutchinson's case*.....342

5 By 11 Geo. II. c. 30. s. 22. persons acting as excise-officers in the execution of their duty, shall, on proof that they were so acting, be taken to be excise-officers until the contrary appear, *Shelley's case*, 340, *notis.*

6 On the trial of an indictment on the 19 Geo. II. c. 34. it must be proved that the prisoner was *armed* with an *offensive weapon*, *Fletcher's case* 23

7 What species of instrument shall be considered as an offensive weapon within the meaning of the statute, is a question of fact for the consideration of the jury, *Cosan's case*.....342, *notis.*

8 Instances of what weapons have or have not been considered as offensive weapons, *Rose's case*, 342, *notis.*

9 The statute 24 Geo. III. c. 47. respecting smuggling, extends to the protection of *excise officers*, *Brady's case*.....803

STAGE COACHMEN.

1 A stage-coachman has such a *possession* of the parcels committed to his *care* to carry, that if they be feloniously taken from the coach, he may indict the thief and lay the goods to be his property; for though, as to his employer, he has only the *bare charge* or *care* of them, yet, as against a wrong doer, he has a *qualified possession*, *Deakin and Smith's case*.....862

STAMPS.

1 By 53 Geo. III. c. 108. all offences against stamp duties may be tried, inquired of, and determined, either where the offence is committed, or the offenders, or any of them shall be apprehended.....1050, *marg.*

2 By 44 Geo. III. c. 98. all anterior Stamp Acts are repealed, and new stamp duties thereby imposed, *Bullock's case*.....996

3 An indictment for forging medicine stamps need not set out a *facsimile* of the stamps; stating the charge generally in the words of the statute, is sufficient, *Collicott's case*.....1048

4 By 49 Geo. III. c. 80. it is an offence to have forged excise stamps knowingly in possession 109

5 A forged bill of exchange, though not stamped pursuant to the statutes of 23 Geo. III. c. 49. and the

23 Geo. III. c. 58. may be given in evidence on an indictment for the forgery, *Rex* v. *Hawkeswood*, 257

6 For the stamp is not, properly speaking, any part of the instrument; it is merely a mark impressed on the paper, to denote the payment of a duty, and is merely collateral to the instrument itself, *C. Reculist's case*.....703

7 And the Stamp Acts, being mere revenue laws, were never intended to make any alteration in the crime of forgery, but only to provide that the instrument shall not be available for the purpose of recovering on it in a court of justice, but not to prevent its being given in evidence for collateral purposes, *Moreton's case*.....258, *notis.*

8 A memorandum indorsed on a stamped policy, denoting that the goods thereby insured are removed to another house, must also be stamped, or the policy will be void, *Gillison's case*..... 1007

9 Stamps on country bank-notes are valuable to the owners of those notes, although once paid and not reissued; and of course stealing them is larceny, *Clarke's case*.....1036

10 In the construction of the 23 Geo. III. c. 49. imposing a duty on receipts, and ordering a stamp to be impressed on all paper "*liable* "*to the said duties*," all paper upon the face of which there is *a mark* resembling *the stamp* is within the Act, *H. Palmer's case*.....352

11 A person who takes the stamps from *old writs*, and fixes them to parchments of the same kind, and then sells them as *new writs* legally stamped, for the purpose of their being *used* by such persons as may buy them from his vendee, is within the penalties of 12 Geo. III. c. 48, *Field's case*.....383

STATUTES.

1 The 2 Geo. II. c. 25. though it make plurally the stealing of *bank-notes* and other *choses in action* felony, yet as it goes on to say, "notwithstanding *any* of these par- "ticulars" it shall be construed singularly to mean the stealing of ONE *bank-note, Hassell's case* 1

2 A statute which takes away clergy, in a common law offence, from such as shall be *found guilty*, does not include aiders and abettors, unless they are expressly named, *Bayne's case*.....7

3 A statute as the 2 Geo. II. c. 24. against forging *a receipt* or *acquittance for money*, does not, *ex vi termini*, include a *receipt on a cash memorandum, Russell's case*.....8

4 Criminal and penal statutes, as 5 Geo. II. c. 30. must be strictly pursued, and, therefore, in an indictment against a bankrupt for not surrendering pursuant to that Act, if it do not state what the Act requires to constitute the offence, it is erroneous, *Frith's case*, 16

5 If a statute make an offence capital, and a subsequent statute inflict a milder punishment on *the same offence*, the latter statute is a virtual repeal of the former statute, for *leges priores posteriores contrarias abrogant, Rex* v. *J. Davis*.....271

6 If a statute be suffered to expire as 2 Geo. II. c. 25. and be afterwards revived, as this was by 9 Geo. II. c. 18. an indictment against the form of the *statute* in the singular number is good; for the *re-enacting statute* is the only statute in force, *Phipoe's case*.....678

7 But formerly, the *revived* and not the *reviving* statute, was considered as the only statute in force, *Morgan's case*.....679, *notis.*

8 Obscurity in any part of a statute shall be explained by the context, *Palmer's case*.....355

9 Statutes upon the same subject, shall be taken *in pari materia*, as interpreting and enforcing each other, *Palmer's case*.....355

10 The several clauses of a statute make one Act, and shall be expounded by each other; and therefore, although the 2 Geo. III. c. 28. s. 12. do not *expressly* say, that the knowing receiver of any part of a ship's cargo shall be guilty of *felony*; yet as the 14th section gives a reward for discovering *such felonies*, the offence shall be construed *felony*, *Rex* v. *Wyer*.....480

11 And now by 39 & 40 Geo. III. c. 22. this offence is declared to be felony, *Wyer's case*.....481

12 The statute 21 Hen. VIII. c. 11. which restores goods to the prosecutor, on conviction of the person who took them, extends only to a *felonious* and not to a *fraudulent* taking, *De Veaux's case*.....585

13 If a statute, intitled "An Act to "indemnify upon the terms *in this* "*Act* mentioned, and *for relief* of "officers, &c." be continued by a subsequent statute, reciting its title, "upon the terms *therein* mention-"ed, and *for the relief* of officers, "&c." the variance is immaterial; for the Legislature, in continuing a statute, are not bound to use any particular form of words, *Longmead's case*.....694

14 The statute 9 Geo. I. c. 22. respecting threatening letters, is not repealed by the statute 30 Geo. II. c. 24. upon the same subject; for the maxim "*leges priores posteriores contrarias abrogant*," only applies where the two statutes cannot stand consistently with each other; but 9 Geo. I. c. 22. relates to cases where there is an *actual demand*, and 30 Geo. II. c. 24. to cases which fall short of *a demand*, *Robinson's case*.....749

15 The statutes 6 Geo. III. c. 36. and 6 Geo. III. c. 48. for the protection of shrubs and plants being passed in the *same session*, are to be considered *in pari materia*; as forming one body of law on the subject, *Howe's case*.....481

16 The statute 24 Geo. III. c. 47. s. 15. extends to *excise officers* as well as to custom-house officers, and officers in the navy, *Brady's case*, 803

17 The statute 26 Hen. VIII. c. 6. respecting the trial of offences committed in *Wales*, extends to subsequently created felonies, and is to be construed according to 26 Geo. II. c. 19. *Parry and Roberts's case*, 108

18 If a statute, as 24 Geo. III. c. 51. impose a duty on hats, and direct a stamp on paper tickets denoting such duty, to be affixed on each hat sold; and a subsequent statute, as 36 Geo. III. c. 125. enact, that *so much* of the former statute as relates to stamped paper tickets shall cease; and that a stamp, denoting the duties imposed by the former Act shall be affixed on the lining of each hat, an indictment, expressly on the latter statute, concluding in the singular number, is good, *Collins's case*.....827

19 The several articles mentioned in the statutes of 4 Geo. II. c. 32. and 21 Geo. III. c. 68. respecting the stealing of things fixed to the freehold shall be taken as *substantive nouns*, and not as *descriptions* of the sorts of fixtures which the Legislature intended to protect, *Senior's case*.....496

20 The judges, in construing penal and criminal statutes, will consider the particular mischief which the

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25 Edw. III. c. 2. High treason, 76, 135, 219
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53 Geo. III. c. 108. Stamps. Trial, 1050

STEALING FROM PERSON.

See Person and *Privately stealing.*

STOLEN GOODS.

1 A person who receives money as a reward for helping another to stolen goods, cannot be prosecuted if the thief die before he is convicted; for the statute 4 Geo. I. c. 11. s. 4. enacts, that unless such person shall apprehend, try, and give evidence against such offender, he shall suffer the pains of felony, according to the nature of the offence committed by the thief; for the death of the principal has prevented the offender from performing the condition, *Drinkwater's case* 15

2 By 5 Ann. c. 31. s. 6. the receivers of stolen goods may be prosecuted for the *misdemeanor*, provided the principal felon cannot be taken, so as to be prosecuted and convicted, *Wilkes's case*.....103

3 A receiver of stolen goods may be tried for a misdemeanor under the statutes 3 Will. and Mary, c. 9. and 5 Ann. c. 31. though the principal might have been taken and brought to justice, *Wilkes's case* 103

4 By 22 Geo. III. c. 58. receivers of stolen goods, except lead, iron, brass, copper, bell-metal and solder, may be prosecuted for the *misdemeanor*, whether the principal felon be amenable to justice or not....104, *notis.*

5 *Money* is not within the statutes 5 Ann. c. 31. s. 5. and 3 Will. and Mary, c. 9. s. 4. against the receivers of stolen *goods*, *Guy's case*...241

This doctrine confirmed, *Davidson's case*.....242, *notis.*

6 It is not felony to receive *Bank-notes*, knowing them to have been stolen; for neither *money* nor *Bank-notes* are considered as *goods and chattels*, within the statutes against the receivers of stolen goods, *William Morris's case* 468

7 A statute, as 2 Geo. III. c. 28. inflicting transportation for knowingly purchasing stolen goods, makes the offence felony, although the statute do not in express terms declare it to be felony, *Rex* v. *Wyer*, 480

8 But now, by 39 & 40 Geo. III. c. 87. s. 22. this offence is declared to be felony.....481, *notis.*

SURPLUSAGE.

1 If on an indictment of principal and accessary for stealing and receiving Bank-notes the indictment charge the accessary with having received them as the *property* and *chattels* of the owner, the word *chattels* may be rejected as surplusage; for Bank-notes are not *chattels* within 5 Ann. c. 31, *Sadi and Morris's case* 468

2 All insensible, unnecessary and useless words may be rejected as surplusage, *A. Redman's case*.....477

T.

TENOR.

1 The word tenor means an exact copy of the instrument set forth, *Gilchrist's case* 660

2 The words "*as follows, that is to* "*say,*" are a sufficient averment, that *the tenor* of the instrument is set out, *Powel's case*.....77

3 And makes a literal recital necessary, *May's case* 192

4 So "against the form of the statute "aforesaid," binds to exact recital, 192, *notis.*

5 But "to the effect following," does not, *Beech's case*.....133

THEFTBOTE.

1 By 4 Geo. I. c. 11. s. 4. if any person take money or reward, directly or indirectly, under pretence, or upon account of helping any person to any stolen goods or chattels, (unless such person apprehend the felon who stole the same and cause him to be tried, and give evidence against him) he shall be guilty of felony, according to the nature of the felony committed in stealing such goods, and as if such offender had, himself, stolen the same.....16

On this statute Jonathan Wild was convicted, for receiving ten guineas from Mrs. *Statham*, for helping her to a box of lace, which had been stolen by Hugh Kelly, 18, *notis.*

2 The principal felon may be admitted an evidence for the Crown against a person indicted on this statute, *Drinkwater's case*.....17

3 And an offender may be indicted on this statute, though the principal felon has not been convicted, *Drinkwater's case* 15

THREATENING LETTER.

See *Letters threatening.*

TRANSFER.

1 An indictment for forging a *transfer* of stock is good, although the stock had never been *accepted* by the person in whose name it stood, and although the transfer was not *witnessed* according to THE RULES of the Bank, *Gade's case*.....732

TRANSPORTATION.

1 On an indictment for returning from transportation, if it appear that the prisoner was pardoned on condition, and has literally complied with the terms of the condition, he shall be remanded to his former sentence, *Max, Miller's case*.....74

2 A prisoner convicted of a *capital crime*, whose sentence is respited during the King's pleasure, and who, on having received a pardon on condition of *transportation for life*, is afterwards found at large in Great Britain, without lawful cause, shall be referred back to his original sentence, *Patrick Madan's case*.....223

3 *Qu.* If a prisoner who is convicted of *a single felony*, and receives judgment of transportation to *America*, but is pardoned on condition of transporting himself beyond the seas, and giving security so to do, can be convicted of the *capital felony*, or ought to be *remitted to his former sentence* for being found at large, without lawful cause, before the term of transportation is expired, he having performed the condition of giving security to trans-

port himself within the time, *Aickles's case*.....390

4 The several statutes relating to transportation.....390, *notis.*

5 Sentence of transportation may be a second time passed upon a prisoner, although the term for which he before received sentence of transportation be unexpired, *Bath's case*, 441

6 The statute 39 Geo. III. c. 85. against servants embezzling their masters' property, does not inflict transportation on offenders convicted of larceny at common law, *Jones's case*.....933, *notis.*

TREASON.

1 A person indicted of *petty treason* and murder combined in one count, may be found guilty of the murder, and acquitted of the treason, *Radbourne's case*.....457

2 The counterfeiting of the gold coin, to be treason within 25 Edw. III. c. 2. must be such in its form that it will currently pass, *Rex* v. *Varley*, 76

3 But it is not necessary that there should be an *impression* on the counterfeit; if it resemble the worn coin it is sufficient, *Welch's case*, 364

4 Having the custody of *a mould* on which is made and impressed the similitude of the current coin, is high treason within the 8 & 9 Will. III. c. 26.; and such *mould* need not be averred to be a tool or *instrument* within the statute, *H. Lennard's case*.....90

5 A conviction of high treason may be upon the evidence of one witness in all cases where there is no corruption of blood, *Gahagan's case*, 42

6 The process of extracting latent silver from the body of base metal, by means of *aqua fortis*, is a colouring with a wash, or material producing the colour of silver, within 8 & 9 Will. III. c. 26. &c. *Lavy and Parker's case*.....153

7 So round blanks of brass and silver, resembling shillings, steeped in *aqua fortis*, by which they acquire the colour and appearance of lead, is a colouring with a material which produces the colour of silver, and is a colouring within the Act; although in their then state they would not pass current; for by only rubbing them, they would perfectly resemble silver coin, *Rex* v. *Case*.....154, *notis.*

8 What shall be considered as *a puncheon* within the meaning of 8 & 9 Will. III. c. 26. *R. Ridgelay's case*, 189

TRESPASS.

1 Where there is no trespass there can be no felony. But there may be trespass without felony, as where persons take the horses of another out of his stable, with a view to proceed on their journey, but without any design to steal them, *Walsh's case*.....1071

TRIAL.

1 A private prosecutor on the Black Act, 9 Geo. I. c. 22. has an option to prefer his indictment and to try the offender in any of the counties of England that may be most conducive to the ends of justice, *R. Mortis's case*.....73

2 A felony committed in *Anglesea* may be tried in *Salop*; for though the 26 Geo. II. c. 19. says, the prosecution may be in the next adjoining English county, which is *Chester*, yet as the 26 Hen. VIII. c. 6. s. 6. says, that it shall be "in the shire of England where the king's writ runs next adjoining to Wales," the statute

26 Geo. II. shall be construed by the 26 Hen. VIII. *Parry's case*, 108

3 The 26 Hen. VIII. c. 6. extends to all felonies subsequently created, and therefore a felony contrary to 49 Geo. III. c. 80. for possessing excise stamps, committed at *Llangeny*, may be tried in the county of *Hereford*, *Window's case*..109, *notis.*

4 An indictment for bigamy on 1 Jac. I. c. 11. may be tried in the county where the offender is apprehended, *Forsyth's case*.....826

5 If a person *on shore* shoot at and kill another upon *the sea*, at the distance of a hundred yards from the shore, it is not within 2 Geo. II. c. 21. but shall be tried by the Admiralty, *Coomb's case*.....388

6 On an indictment being found for an assault, if the defendant enter into a recognizance to appear, *enter*, and try his traverse, he cannot be tried without entering his traverse under the gaol delivery, except he withdraw his plea, and give the prosecutor notice, *Kelsey Fry's case*, 111

7 An indictment for sending a threatening letter may be *tried* in the county in which it was received, although it was written in and sent from a different county, *Girdwood's case*..... 142

8 If, under 39 Geo. III. c. 85. a servant receive his master's money in one county and refuse to account in another, the trial shall be where the refusal was, *Taylor's case*...974

9 But if the servant deny the receipt of the money in the county where it was paid to him, the trial may be in that county, though he refuse to account in another, *Hobson's case*, 975

10 By 9 Geo. II. c. 35. offences against the Act may be tried in *any county* in England, *Fletcher's case*.....23

11 Offences committed in any of the rivers, creeks or havens of this realm may be tried either in the courts of common law or admiralty, *Bruce's case*, 1093

12 In what manner the trial shall be on a *misnomer* pleaded, *Dean's case*, 476

13 By 42 Geo. III. c. 81. the offence of robbing the mail (7 Geo. III. c. 50.) may be tried where committed, or the offender apprehended, 687

TRUSTEES.

1 It is said that an indictment for stealing goods vested in trustees for the use of a parish, under an Act empowering them to indict, and to lay the goods to be "the property "of the trustees," &c. must state them as belonging to *A. B. C.* in their several names, and then add, "*trustees*," &c. *Sherrington's case*, 513

2 But an indictment for stealing goods belonging to the Liverpool Dock, laying them to be the property of "*the Trustees of the Liver-*"*pool Dock*," without naming them individually, is good, *Johnson's case*, 1103

V.

VAGRANTS.

1 A person committed as *a rogue and vagabond* under the 23 Geo. III. c. 88. who breaks gaol, and, on being committed as *an incorrigible rogue* under the 17 Geo. II. c. 5. breaks gaol a second time, and then commits an act of vagrancy, as a *rogue and vagabond*, may be indicted for FELONY, and transported under the Vagrant Act, *Ballie's case*.....396

VALIDITY.

1 In forgery, it is not material whether the forged instrument, were it true, would be of any validity or not, *Coogan's case* 449

Same point, *Sterling's case*.....99

VARIANCE.

1 If an indictment for perjury on an affidavit that the party "*understood* "and believed, &c." state it that the deponent "*undertood* and be- "lieved," yet this variance is not fatal, for the omission of the letter *s* does not make it another word, *Rex* v. *Beech* 133

2 But where the variance alters the word, as *air* for *heir*, *&c.* it is fatal, 134, *notis.*

3 A variance of *receivd* instead of *received* is not fatal, for it is impossible to mistake the meaning of the word, *Hart's case*.....145

4 On a plea of *nul tiel record*, a variance of *Segrane* instead of *Seagrane* is not fatal.....146, *notis.*

5 If an indictment charge a prisoner with forging a note for the "pay- "ment of *money*," and it appear, in setting out the tenor of the note, that it was only for the "payment "of *Fifty*," leaving out the word *pounds*, yet it is not such a variance as will arrest the judgment, *Elliot's case* 175

6 A variance of *Jawick Park*, instead of *Jawick*, in a forged deed, is not material, *Crooke's case*...706, *notis.*

7 If an indictment for an assault charge that the prosecutor received an injury, "*whereby his life was* "*despaired of*," and an indictment for perjury on the trial of the assault, in reciting the above passage, leave out the word "*despaired*," *Qu.* If this be a fatal variance? *May's case* 192

8 A variance between the evidence and an indictment on the 13 Geo. III. c. 56. for removing the stamps on plate, of a *lion passant* instead of a *lion rampant*, is fatal, *C. Lee's case*, 416

9 A prisoner acquitted of forgery on *a variance* between the instrument produced in evidence and the recital of it in the indictment, cannot plead *autrefois acquit* to another indictment for the same offence, *Coogan's case*.....448

10 On an indictment for stealing in the dwelling-house of *Sarah Lunns*, if it appear in evidence that her name was *London* instead of *Lunns*, the variance is fatal to the capital part of the charge, *W. Woodward's case* .....253, *notis.*

11 An averment that a commission of bankrupt issued under the Great Seal of *Great Britain*, is proved by a commission under the Great Seal of *Great Britain and Ireland*, *Bullock's case*.....996

VENUE.

1 A *venue* in *London*, must be laid, in some *parish* or *ward* within the city; and therefore an indictment for perjury, stating it to have been committed "at the *Guildhall* of the city "of *London*," is bad, *Harris's case*, 800

VERDICT.

1 A verdict of "*guilty* of felony only, in stealing in a dwelling-house goods to the value, but *not guilty* of the burglary," ousts the offender of clergy, *Comer's case*.....36

2 So a verdict entered "Not guilty "of the burglary, but guilty of "stealing above the value of forty "shillings in the dwelling-house," is sufficient to warrant a capital judgment. But the entry "Not guilty "of breaking and entering in the "night, but guilty of stealing," &c. is

more correct, *Hungerford's case*, 37, *notis.*

3 For in BURGLARY, the prisoner may be acquitted of the *breaking*, and found guilty of stealing in the *dwelling-house* to the amount of forty shillings, although there be no separate and distinct count in the indictment on 12 Ann. c. 7. *Withal and Overand's case*.....88

4 On an indictment for MURDER, charging that *A.* gave the mortal blow, and that *B.* was present, aiding and abetting, the Jury may find that *B.* committed the fact, and that *A.* was not guilty, *Taylor and Shaw's case* 360

5 On an indictment for *petty treason* and *murder* the prisoner may be *found guilty* of the MURDER, and *acquitted* of the TREASON, although both the charges be blended and combined in one count, *Radbourne's case* 457

6 A special verdict in murder must find that the fact was committed in the same county as that which is laid in the indictment, *Hazel's case*, 382

7 A special verdict in murder may be amended by the minutes taken at the trial, *Hazel's case*.....383

VILLIEN.

1 By the ancient law, a villien on being manumitted, was compelled to perform every condition annexed to the manumission, or the manumission became void.....393

UTTERING.

1 If a forged note be delivered by *A.* to *B.* for the purpose of being put off, both parties knowing it to be forged, such a delivery is a *disposing of* and *putting away* a forged note within 15 Geo. II. c. 13. s. 11. although *A.* was not present when *B.* endeavoured to pass it to another person, *Palmer and Hudson's case*, 978

2 So under the 48 Geo. III. c. 89. if known circulators of forged notes sell them at an under price to persons who at the time knew them to be forged, but who buy them for the purpose of detecting and punishing the offenders, yet this is a disposing of and putting them away within the statute, *Holden's case*, 1019

3 To prove the *guilty knowledge* of an utterer of a forged Bank-note, evidence may be given of his having previously uttered other forged notes, knowing them to be forged, *Whiley's case*.....983

4 The Jury therefore, in such case, may, from the conduct of the prisoner on one occasion, infer his knowledge on another; but the more detached the previous utterings are in point of time, the less relation they will bear to the particular uttering stated in the indictment, *Tattersall's case*.....985

5 So utterings of other notes of the like kind with the forged note, and notes indorsed by the prisoner, and paper and implements for forging notes, may, by shewing his possession of them, be given in evidence, to prove that he knew the note to be forged at the time he uttered it, *Ball's case* 987

6 So also other acts connected, though distantly, with the charge, may be proved to shew *quo animo* the offence was committed, *Roberts's case*, 987, *notis.*

7 Finding a forged note upon the person of a suspected offender, may, with other circumstances, be admitted to prove forgery, though no uttering of it took place, *Elliot's case*, 175

8 But a guilty uttering cannot be inferred from merely finding a forged note at the prisoner's lodgings, during his absence, *Crocker's case*...987

9 For the evidence of the *intent to defraud* must arise from the proof of some *act* done denoting such intention, *ibid*.....992

10 There are no *accessaries after the fact* in uttering a forged instrument, therefore if three persons make a forged instrument, and only one of them utter it, he only is guilty of the offence, *Brighton's case*, 1096, *notis.*

11 So if two persons go in concert to utter a forged note on a banker, and one of them only go into the shop, while the other remains at some *little distance in the street*, it is only the actual utterer who is guilty of the offence; for what will make a constructive presence at common law, will not be sufficient upon an indictment under a statute, *Brady's case*, 1097, *notis.*

12 But there may be an *accessary before the fact* in uttering a forged instrument; for *personal presence* is not necessary to constitute the offence, it being an offence at common law, *Morris's case*.....1096

13 Under the 8 & 9 Will. III. c. 26. which makes the *putting off* counterfeit money a felony, the money must be completely *got rid* of to be within the Act; for if the parties be interrupted before the money is *taken up* by the vendee, though it is *put down* by the vendor, the offence is not complete, *Wooldridge's case*, 307

14 For the mere *uttering* or *tendering* in payment is provided for by the 15 Geo. II. c. 28. *ibid.* 309

15 On a charge for uttering a great number of forged receipts, if it appear that they were *all uttered at the same time*, this is not to be considered as a charge of so many *distinct offences*, and therefore the Court will not put the prosecutor to proceed upon any particular receipt, *Thomas's case*.....882

16 The averment that the offender was a *common utterer* is not necessary in an indictment on 15 & 16 Geo. II. c. 28. s. 3. *Michael's case*, 998

Same point, *Smith's case*.....856

17 Uttering counterfeit *halfpence* is not an indictable offence, *Cirvan's case* .....834, *notis.*

18 If a forgery be committed before the passing of an Act making such forgery felony, the forger cannot be convicted; but the guilty utterer of such a forgery after the passing of the Act is within its penalty, *Reeve's case* 814

W.

WALES.

1 *Salop*, and not *Cheshire*, is "the "next English county" to *Anglesea*, within the meaning of 26 Hen. VIII. c. 6. s. 6. and 26 Geo. II. c. 19. s. 8. that being the next English county where the king's writ runneth, *Parry and Roberts's case* 108

2 The statute 26 Hen. VIII. c. 6. extends to felonies subsequently created, and therefore an offence under 49 Geo. III. c. 80. committed at *Llangeny* in *Brecon* may be tried in the county of *Hereford*, *Window's case* 109

WARRANT.

1 If a warrant charge a person *on suspicion* of forgery, and another person facilitates his escape, the offender cannot be indicted on 16 Geo. II. c. 31. *Walker's case* 97

2 A warrant of attachment issued and signed by a county clerk, in his own cause, is *legal process*, and if the officer be resisted and killed in the due execution of it, it is murder, *Baker's case* 112

3 It is no objection to the legality of a writ of *habere facias possessionem* that the names of special bailiffs were inserted in it, by interlineation, after it was sealed, and before it issued from the sheriff's office, *Harris's case*.....929

4 A warrant of commitment must contain *convenient certainty*, and therefore it is not necessary to allege that the charge was made *upon oath*, for it may be *super visum*, and then an oath is unnecessary, *Platt's case*.....167

5 The Chief Justice of the King's Bench may grant his warrant to bring up the bodies of impressed apprentices, *Apprentices' case*...203

6 A warrant under the vagrant act to search all suspected houses for idle and disorderly persons is strictly confined to persons of that description, *Mary Adey's case*.....208

7 In a warrant for felony it is not necessary to state that the offence therein mentioned was *feloniously* committed; it is sufficient, if enough appear to shew that the offence is felony, *Judd's case*...484

8 *Sed quære*, Whether a warrant for *stealing* any article without saying that the prisoner *feloniously* stole it, would not be bad for uncertainty, *Platt's case*.....162

9 Officers of Excise may seize goods without any warrant from a magistrate for that purpose, *Brady's case* 952

WATER-MARK.

1 The want of the *water-mark* in a forged bank-note is no proof of want of sufficient similarity to a genuine note, *Elliott's case*.....175

WITNESS.

1 By 46 Geo. III. c. 37. a witness cannot refuse to answer any legal question on the ground that he may thereby subject himself to a civil suit for debt.

2 But if his answer will tend to subject him to a criminal prosecution, he may refuse to be sworn, but if sworn he must truly answer, at all events, *England's case*.....767

3 A person who, upon a *voir dire*, admits that he has been convicted of *conspiracy*, or that he has been *pillored* for perjury, cannot be a witness, *Piddle's case* 442

4 And formerly a conviction of *petty larceny* disabled a person from being a witness, but this is now remedied by 31 Geo. III. c. 35.....443

5 A Scotch covenanter may be sworn as a witness according to the ceremony of his sect, *Mildrone's case*, 412

6 A witness disabled by a conviction for *false swearing* is restored to his competency by a pardon, *Reilly's case*.....454

7 A *Mahomedan* is a good witness if sworn on the *Coran*, *Morgan's case*.....54

8 A cashier of the Bank whose name purports to be signed to a forged note "for the Governor and Co." is a good witness to prove the forgery, *Newland's case* 311

9 A person who has no notion of eternity or a future state, cannot be a witness during his ignorance of the obligations of an oath, *White's case*, 430

10 But an *infant* of any age who has sufficient capacity to understand that an oath imposes a solemn obli-

gation to speak truth, may be a witness when sworn, *Powell's case*, 110

11 For witnesses of every description must be sworn before they can give testimony, *Brazier's case*.....199

12 Accomplices, though unconfirmed, are competent witnesses, *Atwood's case*.....464

13 A convict who has suffered the sentence of the law, as for coining copper-money, is a competent witness, *Solomon's case*:.....829, *marg.*

14 But a *capital convict* is disabled, from giving his testimony, nor can his dying declarations be received in evidence. *Drummond's case*, 337

15 For the competency of persons under sentence of death cannot be restored, except by a pardon under the Great Seal, *Gully's case*.....98

16 Persons entitled to parliamentary rewards are competent witnesses, *Rioters' case*.....314

17 A clerk who collects his master's monies, but misapplies it in insurances in the lottery, is a competent witness in an action by the master against the lottery-office keeper, for the recovery of the monies so misapplied, *Clark v. Shee*, 844, *text.*

WRITING OBLIGATORY.

1 The uttering in England of a writing obligatory, drawn in Scotland, commonly called a Scotch bank-note, is not within the statute 2 Geo. II. c. 25. *Dick's case*.....68

2 By 2 Geo. II. c. 25. to forge or utter any *writing obligatory* is felony without clergy, *Dunnett's case*.....583

3 An indictment for forging a bond, laying it to be "a bond *and* writing obligatory," is good upon the statute 2 Geo. II. c. 25. though both terms be used in the statute, a bond being "a writing obligatory" though the converse do not hold generally, *Dunnett's case*.....581

CASES

IN

CROWN LAW

DETERMINED BY THE JUDGES

FROM

THE FOURTH YEAR OF GEO. II. 1730,

TO

THE PRESENT TIME.

1730.

CASE I.

THE KING *against* HASSEL.

It is felony in a servant of the Post-office to steal *a single* bank-note from a letter committed to his care.

AT the Old Bailey on Friday the 16th October 1730, *Thomas Hassel* was tried before LORD CHIEF JUSTICE RAYMOND, present MR. JUSTICE DENTON, and MR. BARON COMYNS, on the statutes 2 Geo. II. c. 25. s. 3. and 12 Ann. c. 7. for stealing *one bank-note* of fifty pounds, the property of *John Arden*, in the dwelling-house of *Edward Carteret* and *Edward Harrison*, Esqrs.

IT appeared in evidence, that the gentlemen in whose dwelling-house the felony was laid to have been committed were the Post-masters-general; that the prisoner was employed, by them, in the Post-office, in the capacity of *a sorter of letters*; that the bank-note described in the indictment had been sent by the post, in a letter from *John Arden* of Manchester, directed to Mr. *Bury* in London; and that the prisoner had received the money for it from the Bank, by the hands of one *Mitton*, a ticket-porter, the day after

1730. that on which the letter would arrive in town by the regular course of post.

HASSEL'S CASE.

BEFORE the prisoner entered on his defence, his Counsel, Mr. Serjeant *Daniel* and Mr. *Strange*, submitted two objections to the consideration of the Court.—FIRST, that the evidence, admitting it to be true, only proved that the prisoner was guilty of an embezzlement and breach of trust, and not of larceny, within the true and legal definition of that crime.—SECONDLY, admitting that the taking was sufficient to satisfy the legal notion of larceny, yet the subject of it was not within the terms or meaning of the Act of 2 Geo. II. c. 25.

UPON THE FIRST POINT they argued, that the prisoner, from the nature of his office, and the extent of the trust reposed in him, was, under the circumstances of this case, discharged from all criminal responsibility. He was employed at the General Post-office as *a sorter of letters*, and had accordingly given security, to a very considerable amount, for the faithful performance of his duty. The mail contained many bags, and each bag a great number of letters, and upon their arrival at the Office, they were immediately delivered into the custody of the sorters, whose business it is to arrange them according to their respective directions, for the purpose of their being afterwards delivered. The delivery of the bags gives *the sorters* an *entire possession*, upon a trust that they will not violate the confidence reposed in them; for whoever sends letters by the hands of others, reposes in the integrity of those into whose hands they are committed, and if any mistake or abuse happen, although it may amount to a high and aggravated misdemeanor, and although they or their securities may be civilly liable for the amount of the loss, yet it is no felony. This distinction is so completely established by the known rules of the Common Law, that it would be trifling with the time of the Court to cite precedents in support of it. The Legislature have themselves acted upon and confirmed this Rule of Law; for by the 9 Ann. c. 10. s. 40. they have expressly provided for this offence, by inflicting a penalty of twenty

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HASSEL'S CASE.

pounds, with incapacity of office, upon any person who shall presume wittingly, willingly, and knowingly, to open or detain any letter after its delivery at the Post-office, and before its delivery to the person to whom it is directed, without an order for that purpose under the hand of the Secretary of State. It is apparent, therefore, that this penalty was all the punishment which the law intended to inflict upon this offence; for it cannot be contended that the prisoner is within the 21 Hen. VIII. c. 7. which makes it felony for *servants* to rob their masters; that Act requiring that the master should be the owner of the goods; and it is clear that the prisoner was not servant to the owner of the note. It indeed furnishes a strong argument that servants entrusted with their masters' goods were not guilty of felony by the common law for taking them away (*a*).

Dalt. 102. Dyer, 5. 1 Hale, 667. 1 Hawk. 138.

UPON THE SECOND POINT they contended, that supposing the prisoner had not the entire or legal possession of this *bank-note*, but a bare charge of the property only, yet it is not an offence within the Act. The statute of 2 Geo. II. c. 25. s. 3. enacts, that "whoever shall steal or take by "robbery any Exchequer orders, or tallies, or other order "entitling any other person to any annuity or share in any "parliamentary fund; or any Exchequer bills, *bank-notes*, "South-Sea bonds, East-India bonds, dividend-warrants, "&c. &c. shall be deemed guilty of felony;" and so goes on enumerating other species of property, all of them in the *plural number*; whereas the fact charged in the indictment is for stealing *one bank-note* only. Penal Acts are to be construed with great strictness, and cannot be made to affect

(*a*) But now by 5 Geo. III. c. 25. s. 17. and 7 Geo. III. c. 50. it is felony, without clergy, for any sorter or other servant of the Post-office to secrete, embezzle, or destroy any letter containing a bank-note, or other security therein mentioned. Upon these statutes *Richard Clay* was indicted at the assizes for York, as a servant to the Post-office, for embezzling a letter containing a bill of exchange. It was objected, that as he had not taken the oath required by 9 Ann. c. 10. s. 17. and 41. he could not be considered as a legal servant to the Post-office: but the Court over-ruled the objection.

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HASSEL'S CASE.

the life, liberty, or property of the subject, but according to their literal import. As to the present case, it is highly probable that the Legislature did not intend to take away life for stealing only *one* of the securities which the Act describes. The 1 Edw. VI. c. 12. s. 10. made it felony without clergy, "to steal horses, geldings, or mares," in the plural number; it was doubtful whether this extended to the stealing of one horse only; and the Legislature thought it proper to pass another Act to supply this defect.

2 Haw. 490.

(1) Created Ld. Hardwicke in 1733; appointed Chancellor 1736; created Viscount Royston and Earl of Hardwicke in 1754.

SIR PHILIP YORKE (1) *Attorney-General*, answered these objections on the part of the Crown.

FIRST,—The offence is clearly felony, and not merely breach of trust; for the prisoner had no property in the *bank-note*, but a bare charge only over *the letter* in which it was contained, to sort and put it into its proper place. It is therefore like the case of a butler who has a charge over plate; or of a shepherd who has a flock of sheep committed to his care; or of a weaver who has silk delivered to him by the throwster to work; and in all these cases, it has been decided that it is felony to steal any of the goods so delivered, notwithstanding the delivery. But admitting, for a moment, that the prisoner was possessed of the property in *the letter*, in the same manner as it is said a carrier is of goods which are delivered to him to carry, yet still he would be guilty of felony; for by opening the letter the privity was determined. And it has accordingly been adjudged, that if a pack of goods, or a tun of wine, be delivered to a carrier, and he open them, and take out part of the goods or wine, he is guilty of felony: but I insist, that a carrier has no such possessory property by the delivery of goods, as will in any case excuse him from the guilt of felony, if he feloniously convert them to his own use.

3 Hen. VII. 12.
21 Hen. VII. 14.
B. Cor. 58.
1 Hale, 505.
1 Hawk. 36.

18 Edw. IV. 4, 5.
S. P. C. 25.
Kely. 35.
1 Hawk. 135.

See a case coram Nares J. Easter Term, 1781.
2 East, 598.

AS TO THE SECOND OBJECTION, I readily admit, that penal statutes ought to receive a strict construction; but they must also be construed according to sound reason, common sense, and the apparent intention of the Legislature. That the present statute extends to *one note* as well as to two or more, is, in my apprehension, very plain and apparent. The words

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HASSEL'S CASE.

are, "whoever shall feloniously steal any *notes*," &c. and then the Act goes on to say, "notwithstanding *any* of these particulars may be termed in law *a chose in action*;" which plainly shews, that it was the intention of the Legislature to make the stealing of *a chose in action*, which *a bank-note* is, felony. It would be a most unreasonable construction to say, that the Legislature intended to make it felony to steal *two* notes of five pounds each, and yet that it should not be felony to steal *one* note of ten thousand pounds. As to the argument that has been drawn from the 1 Edw. VI. c. 12. s. 10. the words in that statute are, "horses, mares, geldings," and not *any* horses, mares, or geldings," according to the manner of expression used in the 2 Geo. II. c. 25.; and yet in that case it was only *doubted* whether it did extend to *one* horse, &c. The 2 and 3 Edw. VI. c. 33. therefore only *declared*, that the stealing of one horse should exclude the felon from the benefit of clergy; which shewed that the Parliament only gave their judgment that it was felony without clergy by virtue of the first Act, the second being merely to remove doubts, and not to make a new law. By 22 and 23 Car. II. c. 7. it is made felony to burn *any ricks or stacks* of corn, &c. in the night-time; and yet it has never been doubted, because this is expressed in the plural number, but that the burning of *one barn*, &c. is felony within the statute.

THE COURT, after consulting upon the subject, declared that it was their clear and unanimous opinion, that there was nothing in either of the objections; but that the offence, if the Jury believed the witnesses for the King, was clearly felony without the benefit of clergy.

THE prisoner was accordingly put on his defence, and he called several witnesses, who established a probable *alibi*; upon which he was acquitted.

1730.

THE KING *against* HODGSON AND OTHERS.

CASE II.

Accidental homicide may be murder, if it happen in the prosecution of an illegal act.

THIS was a special verdict upon an indictment for MURDER, found at the Session-House in the Old Bailey, to the following effect:

THE prisoners, together with several others, were hired by one *J. S.* to assist him in carrying away his houshold furniture, in order to avoid its being distrained for rent. They accordingly assembled for this purpose, armed with bludgeons and other offensive weapons. The landlord of the house, accompanied on his part by another set of men, came to prevent the removal of the goods, and a violent affray ensued. The constable was called in, and he produced his authority, but could not induce them to disperse. While they were fighting in the street, one of the company, to the Jurors unknown, killed a boy, who was standing at his father's door looking on, but totally unconcerned in the affray.

1 Hale, 437. 463. 534. Moor, 86. Cromp. 34. 1 And. 116. 2 Hale, 344.

THE question was, Whether this was murder in all the company?

IN order to avoid the expence which attends the drawing up and arguing *a special verdict*, the Counsel agreed to submit the point to the consideration of the Judges in the shape of *a reserved case*.

Holt, C. J. Pollexfen, C. J.

THE Judges accordingly met; and the two Chief Justices were of opinion, that it was murder in all the company, because they were all engaged in an unlawful act, by proceeding in the affray after the constable had interposed, and commanded them to keep the peace, especially as the manner in which they originally assembled, *viz.* with offensive weapons and in a riotous manner, was contrary to law, though the purpose for which they assembled, *viz.* to carry away the goods was justifiable (1); and cited *Stamf.* 17. 40. *Fitz. Cor.* 350. *Cromp.* 244 (2), where divers go to commit a *disseisin*, and one of them kill a man, the rest are principal felons.

(1) See 11 Geo. II. c. 19.

(2) See also 1 Hawk. P. C. 6th Edit. p. 127. s. 46.

BUT the majority of the Judges held, that as the boy was found to be unconcerned in the affray, his having been killed

1730.

HODGSON'S CASE.

by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act; and therefore the persons, though constructively present, could not be said to be aiding and abetting (3) the death of one who was totally unconcerned in the design for which the parties had assembled. And they cited *Plumer's Case*, *Kely.* 3. 12 *Mod.* 629 (*a*); and two Cases before Lord Chief Justice *Holt*, the one at *Hertford*, and the other at *Sarum* assizes (*b*).

See 8 Mod. 165.

(3) Kely. 70. 1 Hale, 498. 4 Burr. 2073. Strange, 1015. 1 Hawk. P. C. p. 128. Note 3.

(*a*) HOLT, *Chief Justice*, in delivering the judgment of the Court in *Plumer's Case*, cites the following case as having happened at the *Old Bailey* in December Session, 1664: "The Secretary of State, made his warrant to apprehend divers suspected persons, directed to the messengers: the messengers having notice of their being in such a house, took several soldiers with them to assist them to apprehend the said persons, but took no civil officer with them; neither did they make any demand to have the door opened, as they ought by law to do, but broke open the door; and when they had broke open the door, some of the soldiers fell a plundering, and stole away some goods, and THE QUESTION WAS, Whether this was felony in them all?" "That they were all," continues his Lordship, "engaged in an unlawful act, is plain; for they could not justify breaking a man's house without making a demand first; and in that case all those who were not guilty of the stealing were acquitted; notwithstanding their being engaged in one unlawful act of breaking the door; and the reason was, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands." See also Rex *v.* Thompson, Kely, 66, and an Anonymous Case, 8 Mod. 165.

(*b*) These two cases are mentioned by Mr. Justice Foster; 3 Dis. p. 353. See also Keilwey, 161. and Bothwick's Case, Douglas, 202.

1731.

CASE III.

THE KING *against* BAYNES AND OTHERS.

There are no principals in the second degree in privately stealing from the person. S. C. 2 East, 700.

AT the Old Bailey April Session 1731, *Henry Baynes*, *Susan Thompson*, *Hannah Randal*, and *Thomas Blower*, were indicted on 8 Eliz. c. 4. before LORD CHIEF JUSTICE RAYMOND, present MR. BARON COMYNS, and MR. JUSTICE DENTON, for privately stealing a bank-note of one hundred pounds,

1731. payable to *William Lord Malton*, or bearer, from the person of *John Innis*.

BAYNES AND OTHERS' CASE.

UPON the evidence it appeared, that the note was lost during a drunken scuffle at the Prince William Tavern, Charing-cross, and it became impossible to ascertain which, if any, of the prisoners had stolen this note.

1 And. 195. Dyer, 99. 183. 1 Hale, 529. 2 Hawk. 444. 480, 481, 489. Foster, 355, 358.

THE COURT.—The statute upon which this indictment is founded, takes away the benefit of clergy from those who shall be *found guilty* of privately stealing from the person; and as it is totally silent respecting aiders and abettors, it must be construed to extend only to principals in the first degree. It follows, therefore, that the hand alone which takes the property can be guilty of the offence; and as it is uncertain which of the prisoners took the note, it is impossible to find any of them guilty of the capital charge (*a*).

(*a*) See Sterne's case, Old Bailey, Sept. 1787, *post*. The case of Mary and Bridget Murphy, Old Bailey, April 1783, *post*.

1737.

CASE IV.

THE KING *against* RUSSEL.

The person whose name is forged is not a competent witness to prove the forgery.

AT the Old Bailey February Session 1737, *William Russel* was indicted before MR. JUSTICE PAGE, present MR. BARON CARTER, and SIMON URLIN, ESQ. Deputy-Recorder, on the 2 Geo. II. c. 25. for forging *an acquittance and receipt* under a certain account, in the words and figures following:

" *Guinen* AGAINST *Bancillion.*

" Bill *l.* 23 : 4 : 1. *viz. l.* 12 : 10 : 5. and *l.* 10 : 13 : 8.
" Half profit, *l.* 5 : 6 : 10.
" Costs out of purse, *l.* 12 : 10 : 5. } *l.* 17 : 17 : 3.
" My dividend, *l.* 5 : 6 : 10. }
" Received *l.* 4 : 4. Due to me *l.* 13 : 13 : 3.

" RECEIVED *the above contents*,
" R. GATELEY,"

with intent to defraud *Roger Gateley*, one of the Solicitors of the High Court of Chancery.

1737.

RUSSEL'S CASE.

THE Counsel for the prisoner observed, that neither Mr. *Gateley's* testimony, nor any affidavit made in his name, could be admitted in evidence, for that it was determined in the Case of the *King* v. *Whiting* (1) by Lord Chief Justice *Holt*, that where a person is concerned *in interest*, he cannot be a witness.

(1) Salk. 283. Holt, 755. Ld. Ray. 396. Stra. 129. 728.

ON the part of the prosecution it was contended, that *Gateley's* evidence was admissible, for it went to establish the defendant's guilt; and as the consequence of his conviction would be an immediate forfeiture to the Crown of all the property he possessed, *Gateley's* evidence would tend to deprive himself of the possibility of ever receiving satisfaction for the sum due to him upon this account. The objection of incompetency arises from the sort of interest which the witness may have in the nature of the question, or the event of the trial; and if any advantage may accrue to him from giving his testimony, the law, in consideration of the frailty of the human mind, renders his evidence inadmissible. But when the effect of a testimony tends to deprive the witness of a substantial benefit, the law allows his evidence, upon the conception that he will not untruly charge himself, or say any thing wrongfully to his own disadvantage (2).

(2) See Newland's Case, *postea*, and 2 Hawk. 611. 4 Burr. 2256. 3 Wils. 262. 1 Term Rep. 153.

THE COURT were of opinion, that Mr. *Gateley* was not an admissible witness (*a*).

THE COURT were also of opinion, that the instrument charged to be forged was not *a receipt or acquittance for money*, within the meaning of the Act of Parliament; they considered it as a confused *memorandum*, from which it was impossible to collect with any certainty whether the word *received* referred to the *item* of *costs*, or to any of the immaterial *items* of which the note was formed.

A receipt to a *cash memorandum* is not within the statute 2 Geo. II. c. 25.

IT also appeared that the indictment was defective, in not having properly pursued the words of the statute; and for these causes the defendant was acquitted.

(*a*) It is an established rule, that no person who can derive any advantage from the conviction, can be a witness for the King. Watts's Case, Hard. 331. 3 Salk. 172. Rhodes's Case, 2 Stra. 728. Caffy's Case, 2 East, 995.

1738.

CASE V.

THE KING *against* FRITH.

An erroneous indictment against a bankrupt for secreting his effects.

AT the Old Bailey October Session 1738, *Edward Frith* was indicted before LORD CHIEF JUSTICE LEE, (present LORD CHIEF JUSTICE WILLES, and SERJEANT URLIN, Deputy-Recorder) on 5 Geo. II. c. 30. s. 3. for that he being indebted to *George Hatfielde* in the sum of 100l. became a bankrupt, and a commission of bankruptcy being *awarded* against him, he was by the Commissioners declared a bankrupt, and notice in writing was left at his dwelling-house, that he had been declared a bankrupt; and that he was required to surrender himself to the Commissioners *at Guildhall*, and submit to be examined, and to conform to the directions of the said Act. And that afterwards notice was published in the *Gazette* for the said *Edward Frith* to surrender himself at Guildhall, and make a disclosure of his effects, &c. That afterwards Lord *Talbot*, then Lord High Chancellor, did enlarge the time for the said *Edward Frith's* surrendering and discovering his effects, for fifty days, to be computed, &c. That notice was given in the *Gazette*, that the Lord High Chancellor had enlarged the time for the said *Edward Frith* to surrender, &c. and he, the said *Edward Frith*, was therein required to surrender himself to be examined, &c. but that he, the said *Edward Frith*, lightly regarding the laws, &c. feloniously made default, and neglected to surrender himself to be examined, &c. against the form of the statute.

First notice.

Second notice.

Third notice.

THE prisoner's Counsel raised four objections against the validity of this indictment.

FIRST OBJECTION.—The statute enacts, that "If any "person against whom a commission of bankrupt hath been "*awarded and issued out*, &c. shall not, within forty-two "days after notice thereof in writing, surrender, &c." The indictment therefore should have not only stated that the commission was *awarded*, but that it had *duly issued;* for there is a material difference in the meaning of these words; the word

1738.

FRITH'S CASE.

awarded signifying the thing ordered to be done, and the word *issued* signifying the thing done.

SECOND OBJECTION.—The Act says, that "After notice "in the London Gazette that such commission hath been is- "sued, the bankrupt shall surrender himself to the Commis- "sioners named in the said commission, *or the major part of* "*them;*" whereas in one of these notices stated in the indictment, they have spun out their directions for the prisoner to surrender to all the five Commissioners, leaving out the words *or the major part of them.*

THIRD OBJECTION.—The Act says, "The bankrupt shall "have notice that such commission has issued, and of the "time and place of meeting of the Commissioners *therein* "*named*, &c." But in the other notice they say, that he must surrender to three of them, without *naming* any of the rest.

FOURTH OBJECTION.—That there ought to have been an averment in the indictment, that the Commissioners did sit, and that those Commissioners should have been named; whereas they were not named in the notice, which only set forth that he was required to surrender to *the Commissioners at Guildhall*, and it might as well be understood of the Commissioners of Sewers or of the Lieutenancy as of the Commissioners of Bankrupts, for they all sit at the same *Guildhall.*

THE COURT were of opinion, that all these objections were good, and the indictment consequently vicious.

THE prosecutor then moved, that the indictment might be quashed. But the COURT said, it was by no means proper to encourage the quashing of indictments *after prisoners have pleaded.* The motion was accordingly refused; and the prisoner being put upon his defence, an acquittal was entered (*a*).

An indictment not to be quashed after the prisoner has pleaded.
4 St. Tr. 232.
2 Hale, 295.
1 Vent. 69.
1 Hale, 35.
Foster, 27.

(*a*) But the Court may in its discretion quash an indictment at any time, before the Jury are charged with the trial of the prisoner.

1739.

CASE VI. THE KING *against* WESTBEER.

The information of a dead accomplice read in evidence against a prisoner.

AT the Old Bailey January Session 1739, *Thomas Westbeer* was indicted before LORD CHIEF BARON COMYNS, and MR. JUSTICE CHAPPLE, for stealing a parchment writing, *purporting* to be a COMMISSION, dated in the reign of Queen Anne, impowering the Commissioners therein named (pursuant to an order which had been previously made in Chancery, in a cause between Lord *Chesterfield* and *John Cantrell* and Others) to enter and ascertain the boundaries of the manors of *Bradbury* and *Hartsherne*, and to certify how high the water of *Furnace Pool* ought to be kept, &c. AND ALSO one other parchment writing, *purporting* to be a return made to the said commission. The property was laid to be the goods of our Sovereign Lord *the King*, and of the value of *four shillings*.

ONE *Curteis Lulham*, an accomplice, had made a full confession in writing, and given information upon oath against the prisoner before Lord Chief Justice *Lee*, pursuant to the statutes of *Philip and Mary* (1); but before *Westbeer* could be brought to his trial, *Lulham* the accomplice died in prison. The Attorney-General (2), after proving the fact of *Lulham's* death, insisted upon reading his depositions, made before the Chief Justice, as evidence against the prisoner.

(1) 1 & 2 P. & M. c. 13. 2 & 3 P. & M. c. 10.

(2) Dudley Ryder, Esq.

MR. Serjeant *Hayward* and Mr. *Barnardiston* opposed their being read; and contended, that as *the act of God*, which the Law says *shall not work an injury to any man*, had, by *Lulham's* death, deprived the Crown of the opportunity of producing him *vivâ voce*, the admitting his deposition to be read in evidence would *injure the prisoner*, inasmuch as he would lose the benefit which might otherwise have arisen from a cross-examination. The Attorney (2) and Solicitor-General (3) replied, and the point was very much debated. But the COURT over-ruled the objection, and admitted *Lulham's* information to be read; though they said it would not be conclusive unless it were strongly corroborated by other testimony.

(3) John Strange, Esq.

Kely, 55. 1 Lev. 180. Salk. 281. Cro. Eliz. 901. 2 Jones, 53. 1 Hale, 305. 2 Keb. 19. 2 Hale, 284. Foster, 337. 2 Hawk. 605.

1740.

WESTBEER'S CASE.

A commission to settle the boundaries of a manor, is an instrument concerning *the realty*, and not the subject of larceny.

THE COURT, upon hearing the evidence, expressed a doubt, whether the offence amounted to felony. The Jury therefore found a special verdict, "That the prisoner was *guilty* of "privately taking away a parchment writing, value *one penny*, "from the records in the Court of Chancery, purporting to "be a commission under the broad seal; and another parch- "ment writing annexed thereto, value *one penny*, purporting "to be the return to the said commission, with intent to "steal the same; that they were the goods of THE KING; "and that the cause of which they were the records, was "finally determined in the year 1717."

IN Trinity Term 1740, this special verdict and the indictment were removed by *certiorari* into the Court of King's Bench (1). Three objections were raised on the part of the prisoner: FIRST, That it was a false conclusion of the Jury, that these parchments were the goods of the King. SECONDLY, That being records, the indictment ought to have been on 8 Hen. VI. c. 12. s. 3. which introduces an entire new law. THIRDLY, That they concerned the realty, and could not become the subjects of larceny, from their constructive adherence to, and connection with, the freehold.

(1) Sir W. Lee, C. J. Sir F. Page, Sir W. Proby, Sir W. Chapple, Justices.

THIS Case was twice argued at the Bar; but the two first points were very slightly spoken to, and not much relied upon. On the third point it was argued (2) on the part of the Crown, that these parchment writings were neither *chattels real* nor *choses in action;* and the only question would be, Whether they could be construed to be *charters concerning the inheritance?* The reason given by *Mr. Serjeant Hawkins* (3) why a felony cannot be committed of these things is, Because "being of no use but to the owner, they are not supposed to "be so much in danger of being stolen, and therefore need "not be provided for in so strict a manner as those things "which are of a known price, and every body's money." But the present parchments are not of that description, for the Jury have affixed such a value to them as will make the offence *Petty Larceny*. For charters which concern the realty, the heir may bring his action; but for these records, no such action will lie. The case in the YEAR BOOK (4) from

(2) By Mr. Attorney and Solicitor General.

(3) 1 Hawk. P C. 142.

(4) 10 Edw. 4. pl. 14.

1740.

WESTBEER'S CASE.

which this distinction is drawn, says, that felony cannot be committed of charters which concern the realty, because they cannot be valued; but a value has been here affixed, and it is well known that for certain purposes old parchments will sell for a considerable price. It is clear, that the relation to the realty does not *alone* create the exemption; for there is no doubt but it would be felony to steal an *heir-loom*, and yet that savours of the realty.

It was admitted by the Counsel for the prisoner, that the parchment writings were neither *chattels real*, nor *choses in action*; but it was contended, that as they related to the boundaries of manors, and the right of water, they were charters which concerned *the realty*; for what can affect the inheritance more than the right of water, and the boundaries of a manor? It is true, perhaps, that the heir could not maintain an action to recover them, because they are of that nature which are called *nullius in bonis*, and every man has an equal right to resort to them. They are in *the possession of the Crown*, as being public records; but it does not follow from thence that they are *the property of the King*.

The Court gave no opinion, whether these were properly laid to be the goods of the King, nor whether the Law as to this case was altered by 8 Hen. VI. c. 12.; but they were unanimously of opinion that these parchment writings concerned *the realty*, and that therefore the prisoner was Not Guilty of the felony charged in the indictment.

Judgment for a *trespass* in taking away an instrument which concerns the *realty* cannot be given on an indictment for *stealing* it. Kely, 29, 30.

But another Question arose, Whether the prisoner should be discharged, or receive judgment as for a Trespass? He was accordingly remanded, in order that this question might be seriously considered. At another day Mr. Solicitor and Mr. Attorney General attempted to support the affirmative, and cited the Year-Book, 2 *Hen.* VII. 10. and 22. *Cro. Car.* 332. *Kelynge*, 29. *Cro. Jac.* 497. 1 *And.* 351. *Dalt.* 321. But it was answered, that the prisoner would in this case lose many advantages, to which if he were indicted for the misdemeanor he would by law be intitled.

1 Jones, 351. 2 Lev. 208. 1 Mod. 283. 6 Mod. 77. 2 Roll. Abr. 556. 2 Hawk. P. C. 625. 2 Strange, 1137. 2 Hale, P. C. 172.

He might have full Counsel, a copy of his indictment, and a special Jury. Beside, the verdict doth not find the taking to have been *vi et armis*; and if the word *felonicè* be taken away, no *trespass* remains. 1740. WESTBEER'S CASE.

THE COURT observed on the several cases which had been cited on the part of the Crown; and shewed that they were repugnant to the rules of law and principles of justice. The prisoner was accordingly discharged. But see the case, Rex v. Scofield. Cald. 401, 403.

THE KING *against* JOHN DRINKWATER. CASE VII.

AT the Old Bailey October Session 1740, *John Drinkwater* was indicted on the 4 Geo. I. c. 11. s. 4. before LORD CHIEF JUSTICE LEE, present MR. JUSTICE DENTON.

Quære? Whether a person who receives money as a reward for helping another to stolen goods can be prosecuted before the principal offender is convicted.

3 Inst. 134. S. P. C. 40. 1 Hale, 619. 2 Hale, 400.

THE indictment stated, that *Catharine Kaylock*, a repeating watch, the goods of SACKVILLE *Earl of Thanet*, privately from the person of *William Lorton* feloniously did steal, &c. AND THAT afterwards the said *John Drinkwater* did feloniously receive and have eight guineas, as a reward for helping one *Nathaniel Delander* to the said watch; he the said *John Drinkwater* not having apprehended, or caused to be apprehended, the said *Catharine Kaylock*, &c. against the form of the statute.

IT appeared from the opening, that the *Earl of Thanet* had sent the watch to Mr. *Delander*, a watch-maker, to be repaired, who delivered it to *Lorton* his workman, from whom *Catharine Kaylock* privately stole it; and it was admitted that *Catharine Kaylock*, the principal felon, was dead, and had never been convicted of this offence.

BEFORE any evidence was given, the prisoner's Counsel submitted to the Court, that this indictment could not be legally prosecuted. The Act directs, that "wherever any "person taketh money or reward, directly or indirectly, "under pretence or upon account of helping any person to "any stolen goods or chattels, every such person so taking

1740.

DRINKWATER'S CASE.

"money or reward as aforesaid, (unless such person doth "apprehend, or cause to be apprehended, such felon who "stole the same, and cause him to be brought to trial for "the same, and give evidence against him,) shall be guilty "of felony, and suffer the pains and penalties of felony, "according to the nature of the felony committed in steal-"ing such goods; and in such and the same manner as if "such offender had himself stole such goods, in the manner "and with such circumstances as the same were stolen." The punishment therefore to be inflicted upon an offender against this Act must be precisely the same as that which the principal offender would have suffered on conviction. The crime charged against the principal by this indictment is privately stealing, which by 8 Eliz. c. 4. is a capital offence; but the Jury might have acquitted her of the capital offence, and found her guilty of grand larceny; or, if they thought it proper, of petty larceny only (1). These different ways of finding the verdict would have made an equal difference in the nature of the present case; and as the principal was found guilty of a capital offence, or of grand larceny, or of petty larceny, so an offender against this act, who stands exactly in the light of an accessary after the fact, ought to be indicted. It is impossible to know what kind of offence the prisoner has committed, until the conviction of the principal has ascertained the nature and degree of *his* guilt; for the Act expressly requires the same judgment in this case, as should be given against the first offender: but as the first offender has not been convicted, *non constat* whether the crime be petty larceny, single felony, or a capital offence. This case tallies exactly with the doctrines concerning principal and accessary. At the common law the receiving of stolen goods was not felony, but a misdemeanor only. It was made felony by a particular Act of Parliament, exactly as in the case now before the Court; and yet it was never known that an accessary was tried for *felony* till the principal had been convicted; and when the principal could not be found, the accessary could not be indicted for the *felony*, but for the *misdemeanor* only.

(1) See 6 Geo. I. c. 23. s. 9. by which a reward of 40l. is given to whoever shall convict any person of felony *without benefit of clergy*, for the said offence of taking money or other reward to help any person to their stolen goods.

3 W. & M. c. 9.
5 Ann. c. 31.
1 Hawk. 252.
2 East, P. C. 743.

On the part of the prosecution it was said, that if this ob-

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DRINKWATER'S CASE.

jection were suffered to prevail, the whole effect of the Act would be frustrated; for it went the length of contending, that if the principal were even indicted, and died, or broke gaol, at any time before trial, the offender must be discharged. This case has no analogy to the doctrine which prevails in the case of principal and accessary; but if it had, it will be found that Lord *Hale* says (1), though the principal do not appear, yet the accessary may be put *to answer by way of defence.* And Mr. *Serjeant Hawkins* (2) says, "that notwithstanding the "numerous authorities in the old books (3), that an access- "ary shall not be compelled to answer before the principal "has appeared and answered, the contrary opinion is settled "in a great measure at this day." But the present case is extremely distinct from the case of principal and accessary. The fact charged upon the prisoner in the present indictment, is an independent fact; and whether he be guilty of it or not, must be determined by the Jury on all the circumstances of the case. The statute says, he shall suffer pains and penalties, according to the nature of the felony committed; but it does not mention a word of the principal being first convicted. It is therefore sufficient, if it be first proved that the watch was stolen, and then that the prisoner received the eight guineas to restore it. Suppose the charge had been upon that branch of the Act which makes it felony to take money *upon pretence* of helping another to stolen goods; in that case, though it might have been necessary to state that the goods had been stolen, and to have proved that the larceny was committed, yet it cannot be imagined that it would be necessary previously to convict the thief, before the prisoner could be tried for the felony. In the case of *Jonathan Wild* (*a*), the principal felon was not convicted when *Wild*

(1) 1 Hale, 619, 623. 2 Hale, 200. 224.

(2) 2 vol. c. 29. s. 45.

(3) 9 Hen. 4. 3. Sum. 222. F. Cor. 77. B. app. 28. 8. P. C. 46.

(*a*) *Jonathan Wild* was tried at the Old Bailey in May Session 1725, on the statute 10 and 11 Will. III. c. 23. for privately stealing a box of lace in the shop of *Catharine Statham*; but it appearing from the testimony of *Henry Kelly*, the *principal felon*, who had actually stolen the lace, and *who was admitted an evidence for the Crown*, that *Wild* was not in the shop at the time, but only waited at the corner of the street to receive the goods, he was acquitted on this indictment. *Wild* however was immedi-

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DRINKWATER'S CASE.

suffered; and all that has been held necessary upon these indictments, is to prove by *witnesses*, the guilt of the principal, before proof is adduced of the guilt of the prisoner. The production of the record of the conviction of the principal is not in this case necessary. The offence of the prisoner is certainly coupled to that of the principal; but if both parts of the indictment are proved by *viva voce* testimony, the Court can be under no difficulty what punishment to inflict.

THE prisoner's Counsel replied, That it was impossible to prove guilt upon a dead body, which could not possibly be heard in its own defence. It is averred positively in the *indictment*, that *Catharine Kaylock* stole the watch; and if she were alive, she might produce evidence which would go to her acquittal; what punishment could *then* be inflicted on the prisoner? This is apparently *casus omissus* in the Act; but the Court will not supply that which the Legislature ought to have done. Death, in many instances, stops the arm of Public Justice, and disables it from striking at the evil it was raised to punish. As to the instance of taking money upon a *mere pretence* of restoring stolen goods, the indictment in such a case must not only allege that goods were stolen, but the particular manner of the stealing must be proved, and the record of the conviction of the principal be produced, before the prisoner can be convicted of the felony; though he may for the fraud or misdemeanor. As to the citations from *Hale* and *Hawkins*, both those authorities say, the accessary may be put to *answer*, yet his trial is never proceeded on till the principal is convicted; and in *Jonathan Wild's* Case the exceptions were never taken.

THE COURT conceived this to be a case of very great importance, and of the first impression; and it was therefore reserved for the opinion of the Judges. The prisoner was ac-

ately arraigned, tried, and *convicted* on the statute 4 Geo. I. c. 11. s. 4. for receiving ten guineas from *Catharine Statham*, as a reward for helping her to the box of lace so stolen by *Henry Kelly*, who was also examined as a witness on the part of the Crown on this second indictment. See Haslam's Case, Old Bailey, 1786, *post*; and Patram's Case, Bridgwater Assizes, 1787, 2 East, 782.

cordingly detained, and after remaining some time in gaol he was discharged; but the opinion of the Judges upon this question was never publicly communicated (*a*). 1740.

DRINKWATER'S CASE.

(*a*) Mr. East, vol. II. p. 770, suggests with great reason, that the point raised by the prisoner's Counsel, namely, that the principal was not convicted, could not have been the ground of the prisoner's discharge; for that the very terms of the statute preclude the supposition of a conviction of the principal being a necessary preliminary to the trial and punishment of the offender under this statute; for it states that the offender shall be guilty of felony, &c. "unless he doth apprehend, *or cause to be apprehended, the felon* who stole the goods, and cause such felon to be brought to his trial for the same, *and give evidence against him;*" and therefore he conceives that the true ground of the doubt was, because by the death of the principal the *stipulated condition had become impossible to be performed* without any default of the defendant: and in the case of *Jonathan Wild*, who was convicted on this very statute, it appears, that the principal felon was not previously indicted, but was examined as a witness against him. 2 East, Pl. Crown, ch. xvi. s. 155. See also 6 Geo. I. c. 23. s. 9.

THE KING *against* PETER PARFAIT.

CASE VIII.

AT the Old Bailey December Session 1740, *Peter Parfait* was indicted on 7 Geo. II. c. 22. before LORD CHIEF JUSTICE WILLES, MR. JUSTICE CHAPPLE, MR. BARON CARTER, and SIR JOHN STRANGE, Knt. Recorder, for assaulting *Thomas Weston* on the King's highway, with a pistol, with an intent to rob him.

On 7 Geo. II. c. 22. there must be a *demand*, as well as an *assault*, to constitute the offence. S. C. 1 East, 416.

IT appeared by the evidence, that the prosecutor, a coachman, was driving his coach along the road leading to *Pancras*, and that the prisoner presented a pistol at him while he sat on his box, and called out to him to stop; but it did not appear that he had made any demand of money.

THE COURT. This is not a case within the meaning of the Act of Parliament; for a demand of money or other property must be made to constitute this offence. A demand, however, may be made by action as well as by speech; as if a man who is deaf and dumb stop a carriage on the highway, and

1 Hawk. 250*.

1740. put his hat into the carriage with one hand, while he holds a pistol *offensively* in the other, or the like; but then the action must be plain, and unequivocally import a demand. In the present case, no motion or offer to demand the prosecutor's property was made (1).

PARFAIT'S CASE.

(1) See the Case of William Thomas, and they were *post*, Old Bailey, July 1784, and the Cases of Christopher Trusty and Thomas Howard, convicted Old Bailey Session July 1783, before Thomas Harrison, Esq. Deputy Recorder, on 7 Geo. II. c. 22. on evidence of their having stopped a chaise and presented a pistol, without making any express demand of money, transported, 1 East's P. C. 418, 419.

1741.

CASE IX.

THE KING *against* FITZGERALD AND LEE.

Signing a wrong *Christian* name of the person whose will a false instrument purports to be, is a forgery.

S. C. 2 East, 953.

AT the Old Bailey in September Session 1741, *Dominick Fitzgerald* and *James Lee* were indicted for forging a paper purporting to be the last will and testament of *Peter Perry*, late a seaman on board his Majesty's ship the *Lancaster*, with intent to defraud the King.

THE will began: "In the name of God, *Amen.* I *Peter* "*Perry*, &c." and ended "*John* His Mark *Perry.*" The prisoner, *Fitzgerald*, carried the will to the office of the Deputy Register, who, on observing the difference of the Christian names, told him, that he must produce the person who had written the will, or the person who was present when it was executed, in order to account for this error, before the probate could be granted. *Fitzgerald* accordingly produced the other prisoner *Lee*, who, in the name of *Welsh*, swore that he was one of the subscribing witnesses; that the name of the deceased was *Peter Perry*; that the said *Peter Perry* did make his mark to, and deliver the said will; and that he *(Welsh)* had by mistake written the name *John Perry* instead of *Peter Perry.* Upon this, a probate of the will was granted.

The *muster-book* of the Navy-Office is admissible evidence.

See Rhodes's Case, *post.* p. 24.

IT was also proved by the *muster-book*, transmitted by the officers of the ship to the Navy-Office, and which was produced by the Clerk of the Tickets from the Navy-Office, that *Peter Perry* belonged to the ship *Lancaster*; that at the time of his decease there were 42*l.* 16*s.* due to him; and that a

1741.

FITZGERALD AND LEE'S CASE.

ticket for the payment of the same was made out, and delivered to a person who brought the probate of the will in question.

THE Jury found the prisoner *Guilty*; but the case was reserved for the opinion of the Judges on two questions. FIRST, Whether the muster-book was admissible evidence? SECONDLY, Whether this was in law a forging of the will of *Peter Perry*?

ON the first day of Michaelmas Term, 15 Geo. II. the Judges assembled at Serjeants-Inn-Hall to consider of the case, but their opinion was never publicly given. The prisoners, however, were afterwards executed pursuant to their sentence.

THE KING *against* JAMES HALL. CASE X.

AT the Old Bailey in September Session 1741, *James Hall* was indicted before Sir JOHN STRANGE, Recorder, for petty treason, for maliciously killing his master *John Penny*, Esq. the principal of Clement's-Inn; to which indictment the prisoner pleaded *Guilty*, and received judgment to die according to law.

THE deceased was brother to *the Dean of Litchfield*, and the circumstances under which the fact was committed being extremely atrocious, the family applied to the Court, before the sentence was passed, requesting that for the sake of example an order might be made to the Sheriff to hang the convict in chains.

THE COURT, after a long consideration of the subject, said, that they had no power to make an order for that purpose, and referred the parties to the Council of Regency, the King being then in *Hanover*; for that the bodies of condemned murderers being entirely at the King's disposal, his Majesty, or his representatives, were alone capable of making any order on this subject.

The bodies of executed murderers, were, by the Common Law, at the King's disposal, and therefore the Court could not direct them to be hung in chains; but by 25 Geo. II. c. 37. the Judge may, *after* sentence pronounced, *order* the body to be hung in chains.

1741. HALL'S CASE.

AN application was accordingly made to the Council of Regency at their first sitting at Whitehall, through the means of the *Archbishop of Canterbury* and the *Duke of Newcastle*, who were members of it; and it was at first conceived to be within the province of the Court where the prisoner was tried; but on the opinion which that Court had given being stated to the Council, an order, reciting that it was on *the petition* of the relations of the deceased, was at length made, directing the convict to be hanged in chains.

AND on Monday 14th September 1741 he was, pursuant to the sentence of the Court, executed at the end of Catherine-Street, in the Strand, and afterwards hung in chains at *Shepherd's Bush* in the County of *Middlesex*, pursuant to the order of the Council of Regency.

By 25 Geo. II. c. 37. all persons found guilty of wilful *murder* shall be executed on the day next but one after sentence passed, unless the same shall happen to be *Sunday*, and in that case on the *Monday* following: the body, in London or Middlesex, to be conveyed to the Surgeons Company to be *dissected* and *anatomized;* and in any other part of *Great-Britain*, to be delivered to such surgeon as the Judge shall direct. It is also enacted, that the sentence shall not only express the usual judgment of death, but also the *time* appointed for the execution thereof, and the *marks of infamy* thereby directed for such offenders; and that it shall be in the power of the Judges to appoint the body of any such criminal to be *hung in chains*.—At a meeting of the Judges in 1752 it was agreed, that the judgment for *dissecting* and *anatomizing*, and *time* of execution, ought to be pronounced in *petty-treason*, though *murder* only be mentioned. It was also determined in Michaelmas Term 10 Geo. III. that except in the cases within this Act, the *time* and *place* of *execution* are by law no part of the judgment, 4 Bl. Com. 397; and that in all cases within the Act the judgment for dissection and anatomizing *only*, and not hanging in chains, should be part of the sentence; but that if it should be thought adviseable, the Judges might *afterwards* direct the hanging in chains by a special order to the Sheriff. Foster, 107.

1742.

THE KING *against* FLETCHER. CASE XI.

A person armed only with a *common whip*, who aids and assists other persons armed with fire-arms and other *offensive weapons*, in smuggling goods, is not a felon within the statute, 9 Geo. II. c. 35. s. 10. a *common whip* not being *an offensive weapon* within the meaning of the Act.

S. C. Stra. 1166.

IN the King's Bench, on the 26th of March, 1742, *Thomas Fletcher*, *Richard Nash*, and three others, were tried on an indictment on the statute 9 Geo. II. c. 35.

THE indictment charged, that they with divers other persons unknown, being armed with fire-arms and other offensive weapons, did feloniously assemble in order to be assisting in running uncustomed goods.

THE Jury found a special verdict to the following effect, *viz.* That the defendant *Fletcher*, on the 28th of February 1736, was hired by one *Johnston*, to go with him and six others to *Kennington*, in the county of *Norfolk*, to be assisting to them in running and carrying away 900lb. of tea, for which he was to have a reward of half a guinea; that he, in pursuance of such agreement, with such intent, and to resist the officers of the customs did go; that he carried with him a whip of a common size; but that the others had *fire-arms* and other offensive weapons; that they assembled on the first of March, and put the tea on their horses; that the defendant put on his horse 100lb. of tea, and carried it clandestinely to ******, having the said whip in his hand; and that he received the half guinea for so aiding in carrying away the tea.

The question was, whether the defendant, who was aiding and assisting armed persons, to the number of three and more in clandestinely running tea, is guilty of felony within 9 Geo. II. c. 35. s. 10. having no other arms but a whip.

LEE, *Chief Justice*, delivered the opinion of the Court. This question depends on the statute 9 Geo. II. c. 35. s. 10. which makes an offence felony which was not so before: therefore it is necessary to determine this case according to the strict directions of the Act, which is the constant rule observed in the construction of a statute which takes away the benefit of clergy. It was so settled on the statute, 1 Jac. I. c. 8. called the Stabbing Act, that none but the person guilty of the fact was guilty of the felony, and not the aiders. This

1742. FLETCHER'S CASE.

doctrine is maintained by *Lord Hale*, 468: so on the 8 Eliz. c. 4. against pick-pockets, aiders are not included: so on 39 Eliz. c. 15. which makes the breaking a house in the day-time, and taking to the value of five shillings, felony without clergy, the person entering the house is included, and not the aiders, as they are in burglary, *Cro. Car.* 473. The requisites of this Act are, that three or more persons be assembled for the purpose of running goods, and armed with fire-arms or other offensive arms or weapons, and "that all "and every such person and persons, being armed and "assembled as aforesaid, in order to be aiding and assisting in the clandestine running, landing, rescuing, or carrying away any prohibited or uncustomed goods, shall be "guilty of felony, and transported as a felon or felons for "seven years, in the same manner as felons are to be transported by the statutes 4 Geo. I. c. 11. and 6 Geo. I. c. "23." From hence it is plain, that the being assembled, unless they are armed, does not create the offence; and the words "being armed as aforesaid," must relate particularly to every one of the assembly; so that the defendant, not being armed with an offensive weapon, having only a whip of a common size, is not guilty of felony within the Act, and must be discharged (*a*).

(*a*) It is said in the report of this case, 2 Stra. 1166, that the Court did not determine it upon the first argument, but gave SIR DUDLEY RIDER, the Attorney-General, time to consider of it; and that he, upon conference with SIR JOHN STRANGE, the Solicitor-General, declined to argue it; and that the prisoner had judgment and was discharged.

CASE XII.

THE KING *against* ROBERT RHODES.

On an indictment for forging a Seaman's will, the *muster-book* of the Navy-Office is good evidence to prove the identity of the supposed testator.

AT the Old Bailey April Session 1742, *Robert Rhodes* was indicted before MR. BARON REYNOLDS, for forging a certain paper, partly written and partly printed, signed with

1742.

RHODES'S CASE.

the name of *John Thompson*, purporting to be the last will and testament (*a*) of the said *John Thompson*, a seaman, late on board his Majesty's ship *Flamborough*, deceased.

It appeared by the evidence of the Clerk of the Ticket-Office in the Navy-Office, that it was customary for the Captains of men of war to transmit accounts of their crews to the Navy-Office as frequently as possible, and that these accounts are entered regularly in muster-books, containing the names of all who are living, dead, or have run away. The Muster-Book belonging to the *Flamborough* was produced, in which there was this entry: "*John Thompson*, an able "seaman, died 22 August 1739, at Turtle-Bay, on board "the *Flamborough*."

First Point.—The prisoner's Counsel contended, that as the prisoner was charged with forging the will of *Thompson*, it was incumbent on the prosecutor to prove by the best evidence the nature of such a fact would admit of, that the testator was dead; and that the best evidence of that fact was by some one of the many persons who were on board the ship, and not by the accounts of the Captain or other officers, who might by accident or design return the man dead when he was really alive.

The Counsel for the prosecution answered, that the objection was incongruous on the part of the prisoner, for that he had actually proved the will in Doctors' Commons, and received the wages at the Navy-Office by virtue of the probate, which implied an acknowledgment by him that *Thompson* was dead; but that, exclusive of that reason, it was the constant course and uninterrupted practice of the Court to admit the entry in the muster-book, after it had been authenticated by the clerk who signed it, as full evidence of the fact.

The Court over-ruled the objection, and cited the case of *Fitzgerald* and *Lee* (1), in *Mich. Term*, 15 Geo. II. where this point arose, and a *muster-book* was admitted as evidence of the same kind of fact (*b*).

(1) See *ante*, p. 20.

(*a*) See 2 Bl. Rep. 787, 790.

(*b*) At the Old Bailey, in September Session 1787, *Richard Ramsbottom*

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An executor named in a subsequent will by the same testator to that which is charged to be forged, is not a competent witness to prove the forgery. *Sed quære? et vide* S. C. 2 East, 995. Hard. 331. 2 Sid. 237. Salk. 283. Stra. 595, 728. 2 Hawk. 611.

SECOND POINT.—In the progress of the trial it appeared, that the will set out in the indictment, in which *the prisoner* was named executor, was dated the 6th of Sept. 1736, and that another will existed in the name of *Thompson*, (which was produced in Court,) dated 7th March 1737, in which one *Carter* was named executor.

CARTER was called as a witness on the part of the prosecution to prove, that the will in which the prisoner was named executor, was not in the hand-writing of *Thompson*, the supposed testator. The competency of his evidence was objected to on the ground of interest. To support this objection it was contended, that he stood in a similar predicament with a man whose name is charged to be forged to a bond, note of hand, bill of exchange, or other security, and is produced to prove that it is not his signature: and that in such a case the law refuses his evidence, because it tends to destroy the validity of an instrument which affects his interest. In the present case there are two wills, *Carter* the witness claiming *an interest* as executor under one of them, and *Rhodes* the defendant claiming in the same way under the other. The evidence therefore of *Carter*, by disproving *Rhodes*'s will, tends to confirm and establish his own, and by this means to promote the interest which he claims.

See the Case of Brent v. Baker, 3 Term Rep. 27.

ON the part of the Crown it was answered, that an interest was not sufficient to destroy the competency of the witness, unless it be of such a nature as may be materially affected by the event of the trial. The instances of the drawer of a note or the obligor of a bond do not apply; for there, the evidence tends to destroy a security upon which,

See Walton v. Shelley, 1 Term Rep. 301.

was indicted for forging a Seaman's Will. To prove the probate revoked, *Thomas Fletcher*, a clerk in the Prerogative Court, produced an entry of the revocation in a book called *The Assignation Book*, in which all causes are entered by the Register, and which was kept officially by the witness as the only record of such proceedings, and of the decrees of the Court. It was objected that this book was not admissible evidence. But THE COURT was clearly of opinion, that it was evidence to prove the fact of the probate being revoked.

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if valid, the witness is immediately liable: but in the present case, there can be no question which of the wills has the better title. Admit for a moment, that *Rhodes*'s will is in the hand-writing of the testator, yet it being anterior in point of date to that under which *Carter* claims, it can never be established as the *last* will of *Thompson*; so that the interest which *Carter* possesses, does not in any degree depend upon the question now before the Court, viz. Whether the will charged to be forged, under which the prisoner claimed, be in fact real or fictitious? The acquittal or condemnation of the prisoner does not in any way affect *Carter*'s right to a probate; he is intitled to it, as executor of the *last will*; and his interest cannot be concerned in any event which may be produced by his testimony of the fact which he is called upon to prove.

See Dr. Dodd's and Newland's Case, *post.*

Salk. 283. Stra. 1043. 1104. Ld. Ray. 1229.

THE COURT were unanimously of opinion, that *Carter*'s testimony was not admissible.

THE KING *against* BRANGAN.

CASE XIII.

AT the Old Bailey September Session 1742, *Patrick Brangan* and another were tried for a highway robbery and acquitted. The prosecution appeared to have been brought merely for the purposes of vexation and oppression; and the prisoner's Counsel applied to the Court for a copy of the indictment.

A prisoner upon his acquittal is not intitled *ex debito justitiæ* to a copy of his indictment.

LORD CHIEF JUSTICE WILLES, who tried the prisoners, acknowledged that the prosecution bore the strongest marks of being unfounded and malicious, but refused the application, because it was not necessary that *he* should grant it; declaring, that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to *a copy of the record of such acquittal*, for any use they might think fit to make of it; and that after a demand of it had

1 Bl. Rep. 385. 1 Ld. Ray. 253. Carth. 421. 2 Stra. 1122. 3 Black. Com. 126.

1742. been made, the proper officer might be punished for refusing to make it out (*a*).

BRANGAN'S CASE.

(*a*) In 16 Car. II. an order in writing was made by five Judges, that no copies of any indictment for felony should be given at the Old Bailey without special order, upon motion made in open Court, at the general gaol delivery. Kely. Rep. 3. and in May Session 1739, this order was republished by the direction of the Court.—The Court will not grant a copy of the indictment where the acquittal arises from the incompetency of a witness: Quick's Case, January Session 1784; and see Bevan's Case, January Session 1786.

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CASE XIV.

THE KING *against* JOHN WAITE.

It was not felony by the common law, for a Cashier of the Bank to embezzle an India Bond committed to his care, pursuant to the statute 12 Geo. I. c. 32.

See 2 East, 570.

AT the Old Bailey February Session 1743, *John Waite* was indicted before MR. BARON REYNOLDS (*a*) upon 2 Geo. II. c. 25. s. 3. and 12 Anne, c. 7. for stealing on the 10th May 1741, in a certain dwelling-house, wherein *Zerubabel Crouch* and divers other persons did dwell, six East India Bonds of £100 each, laid in one count, to be the property of the Governor and Company of the Bank of England: and in another of a person unknown, against the statute, &c.

BY the statute of 12 Geo. I. c. 32. respecting orders of the Court of Chancery it is directed, "That Masters in Chancery "shall deliver into the Bank of England, the money, bonds, "tallies, orders, and effects of the suitors of the said Court, "under their respective care and direction; that the Bank "shall receive all interest due upon such securities; and that "upon paying in such money, bonds, tallies, orders, &c. the "Master shall take a certificate thereof from one of the "Cashiers."

IT appeared that the prisoner was a Cashier of the Bank; that in the year 1736, there being a great number of East India Bonds in the custody of the Bank, and the East India

(*a*) It seems that this case was tried before CARTER and DENNISON, 2 East, 570.

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Company resolving to reduce the interest, it became necessary to apply to the Court of Chancery to have the bonds taken out of their vaults, and exchanged for the Company's new bonds; that the prisoner, as Cashier, received several of these new bonds, and gave receipts for them; that on the 21st April the Court of Chancery, in the cause of *Broome v. Broome*, ordered the seventeen bonds which were in the Bank to be delivered out; and seventeen bonds were accordingly delivered by the prisoner to the bearer of the order. Upon inspection, they were found not to be the identical bonds which were described in the cause. An application was therefore made to the Directors, that the right bonds might be searched for, and delivered. Directions were accordingly given for this purpose to the prisoner, who kept the key of the chest in which they were deposited in the vault; but instead of so doing, he took an opportunity of going away. His flight created suspicion; and upon opening his desk two India Bonds were found, which had a little time before been brought in by order of the Court of Chancery. Upon further inspection it was found, that the bonds belonging to the cause of *Broome v. Broome* were taken away; and it was proved, that the prisoner had carried six of them to a Broker, who sold them for the prisoner's account, and paid him the produce. It also appeared that the bonds in question had never been deposited in the vault; but that the prisoner, when he received them from the Court of Chancery, had locked them up in his own desk, and had converted their produce to his own use. It also appeared that the prisoner had given security to the Bank for his fidelity.

See Rex v. Bazeley, *post.*

WYNNE, AGAR, KETTLEBY, and HAYWARD, *Serjeants*, contended in favour of the prisoner, that he was not guilty of felony, within the meaning of the Act of Parliament on which the indictment was founded. The 2 Geo. II. c. 25. s. 3. enacts, "That if any person or persons shall *steal, or* "*take by robbery*, any of the securities mentioned in the "Act, notwithstanding any of the said particulars are term-"ed in law *a chose in action*, it shall be deemed and con-

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"strued to be a felony of *the same nature, and in the same* "*degree*, as it would have been if the offender had stolen, "or taken by robbery, any other goods of the like value "with the money due on such securities, &c." It is evident from the words of this Act, that the Legislature did not intend to alter the nature of the offence of larceny, as it stands upon the grounds and principles of the Common Law; but only meant to introduce a new species of property as the subject of felony, the stealing, or the taking of which by robbery is punishable in the same degree and manner as if the offender had taken goods or money to the same amount. It cannot be pretended that the taking imputed to the prisoner was by robbery, for that requires force; if therefore he has been guilty of any crime within this statute, it must be that of simple grand larceny. The facts are, that the prisoner was Cashier, or servant, to the Directors of the Bank, and has given security to them, not merely to answer for any accidental occurrence or misfortune, but generally, for the faithful performance of the trusts reposed in him. A special property in these India Bonds undoubtedly resides with the Governor and Company of the Bank of England; but the Directors had committed them to the custody and controul of the prisoner, as their Cashier, under a confidence that he would not betray his trust; and this trust is in some measure directed by the Legislature itself; for by the 12 Geo. I. c. 32. it is a Cashier alone who can give a receipt for the bonds paid in by the Court of Chancery. Now by the rules of the Common Law, where property is delivered to the custody and possession of another *in trust*, he cannot be guilty of felony in taking it away. He may abuse the confidence reposed in him, by converting the property to his own use, but this subsequent act cannot alter the nature of the original contract. Many authorities might be produced to confirm this position. It has been universally admitted, that if a carrier go away with goods *entrusted to him*, and sell them, it is not felony. 3 *Inst.* 102. 1 *Hale*, 504. 13 *Edw.* 4. 9 *Staund.* 25. *Kely.* 35. 1 *Roll. Abr.* 73. But it may be said, that although the prisoner had the pos-

But see the statute 39 Geo. III. c. 85.

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session of *all* the bonds, yet he had not possession of *any part*, and therefore could not separate those mentioned in the indictment from the rest; and certainly the ancient cases afford a distinction upon this point: for it is said, that if a carrier break open the package, and sell part of the goods, he is guilty of felony. *Dalton*, c. 102. 1 *Hawk.* c. 33. s. 5. But in that case, the thing committed to his care is single and entire; in the present case, each bond is distinct and separate. The property must be taken from *the possession* of the owner. If a man deliver or lend a horse to another, and he rides away with it, it is not felony. *Co. Pl. Crown*, 107. *Butler's Case*, and 1 *Hale*, 504. This is a case common in all the Books, and we rely strongly upon it. Suppose a man go to an inn-keeper under pretence of chaffering for a horse, and when he has got upon his back rides away with it, this is not felony. 1 *Hale*, 504. 667. *Summary*, 61 (1). This law is confirmed by 21 *Hen.* VIII. c. 7. which makes it felony in a servant to take a horse without the leave of his master, and ride away with it, 3 *Hen.* VII. 126. 1 *Hale*, 505.; for this proves, that it would not be so considered in the case of a common person. The prisoner was as much entrusted with these India Bonds by the Directors of the Bank, as the Governor and Company themselves were by the Court of Chancery. They always remained with the prisoner, and he by *his receipt* is liable and answerable. But his misapplication of them cannot be construed felony; for no man can be guilty of stealing that which he has in his own possession; and it is clear from his receipt, that he did not come by them tortiously. They were legally in his custody; he was trustee to the Company for their amount, and is answerable in a civil action for their value. Suppose for a moment that a body corporate could be guilty of felony, and that the Directors had embezzled these bonds, Could they have been charged criminally for such an act? Certainly not; but they would have been obliged to make satisfaction to the suitor to whom they might eventually belong: and, upon what solid ground, in this case, can any distinction be made with respect to

(1) *Vide post.* The King v. Pares, *contra.*

See Rex v. Bazeley, *accordant, post.*

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persons? The prisoner had a special property in the bonds, and might have maintained trover to recover them. They came to his possession by actual, and not constructive delivery only; and it has lately been determined by the King's Bench, upon a special verdict out of this Court, that stealing Chancery Records, by taking them out of the office, and selling them, is not felony (1). But if these arguments, founded on the doctrines of the Common Law, should be thought lame or impotent, there is, subsequent to the period at which this offence is charged to have been committed, a legislative declaration of the law decisive in favour of the prisoner; for by 15 Geo. II. c. 13. s. 12. it is enacted, "That if any officer or servant of the Bank of England, "being entrusted with any note, bill, dividend, warrant, "*bond*, deed, or any security, money, or other effects be- "longing to the said Company, or having any of the said "securities *lodged* or *deposited* with the said Company, or "with him, as an officer or servant of the said Company, "shall secrete, embezzle, or run away with the same, or "with any part thereof, he shall suffer death without benefit "of clergy." This clause clearly proves, that the offence with which the prisoner is charged was not before a felony; and as the Act has passed long since *the time* laid in the indictment, and does not contain any retrospective words to give it an *ex post facto* operation, we humbly conclude that the prisoner must be discharged.

(1) This Case was determined on a different point. *Vide ante*, p. 13.

SIR JOHN STRANGE, Knt. *Solicitor-General*, Mr. BOOTLE, and Mr. PURCHAS, on the part of the Crown. By the statute 12 Geo. I. c. 32. the Bank of England are made expressly liable for these bonds, after the certificate has been given by the Cashier, as the Act directs. In the present case the bonds were carried from the Court of Chancery to the Bank, and as that corporation must have proper servants to transact the different branches of their very extensive and important concerns, the prisoner at the bar was the proper person to receive them from the Accountant-General. The moment the prisoner received them, that moment they came into the possession of the Bank, and not into the legal pos-

Vide post, Rex v. Bazeley, *contra*.

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session of the prisoner (*a*). The receipt which he gave for them proves that it was not for himself; for it expresses, that they were received *for the Governor and Company of the Bank of England*; and it is immaterial whether the bonds are under their own lock and key, or under the lock and key of their servants and Cashiers; for in consideration of law the property is in the possession of the Bank. His receipt will not entitle the suitors to call upon *him* for the money, for it is virtually the receipt of the Company. It is said, that a man cannot steal from himself, and if it be taken abstractedly, the assertion is certainly true; but it is equally certain that a man may commit a felony of what he has in his own possession. The case in *Lord Hale*, 504, 505. will prove this: A carrier receives goods to carry to Dover, and he carries them away, it is no felony; but if, having carried them to the place appointed, he afterward secretly take them away *animo furandi*, it is felony; for the possession which was imparted to him from the owner being determined by the delivery, his subsequent taking is in all respects the same as if it had been done by a stranger. 13 *Edw.* IV. 9. *Co. P. C.* 107. So in the present case, the moment the bonds are deposited in the vault, that moment the prisoner's possession, if ever he had any, ends. If a carrier in his journey unpack goods, and take any thing out of a case, box, or pack, it will be a felonious taking, for he had no authority to separate the goods; his authority was to receive the bundle entire, and to deliver it entire, at such a place. *Vide* 21 *Hen.* VII. *pl.* 14. Let us compare the cases: Twenty India bonds are delivered at one time to the prisoner, and he converts three of them to his own use; Is he not in the same case with the carrier who takes part of the goods out of a parcel, and does not deliver them to the party they are for? Is not this evidence to the Jury of a felonious taking? The Gentlemen have put a case, that if a man go to an inn to hire a horse, and get upon its back, and ride away with it, it is not felony; but this is not law, for

See Lord Kenyon's and L. C. J. Eyre's observations on this point, 2 East, 573, 574.

(*a*) But see Rex v. Beaseley, *post*.

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the horse is not *lent* in this case, and therefore it must be felony (1). There is a difference between having the *care* of goods and the *legal possession* of them. In the present case the prisoner had the care of the bonds, but not the legal possession, and it cannot now be controverted, that those who have a bare charge only, may be guilty of felony. *Serjeant Hawkins*, in his Pleas of the Crown, *Book* 1. *c.* 33. *s.* 6. says, "That one who has *the bare charge*, or the *special care* of goods, but not *the possession* of them; as a "shepherd who looks after sheep, or a butler who takes "care of plate, or a servant who keeps the key of my cham-"ber, or a guest who has a piece of plate set before him "at an inn, may be guilty of felony in fraudulently taking "away the same; for in all these cases the offence may as "properly come under the word *cepit*; the injury to the "owner is as great, and the fraud as secret, and the vil-"lany more base than if it had been done by a stranger." The circumstances under which the prisoner had the management of these bonds, prove that he had a *bare charge* only, much more forcibly than the cases of either the butler, the shepherd, the servant, or the guest; for the bonds remain in the custody of the Cashier only until the Directors go down to put them into the vault, and then the Cashier attends to lock them up in the sight of the Directors. But suppose, from the circumstance of the Cashier keeping the key of the chest, it should be considered as a sort of *mixed possession*, the construction of law is, that the true possession is in him who is the owner or master of the goods (2). If an apprentice, says *Lord Hale*, 506. embezzle his master's goods or money out of his shop, he is guilty of felony, notwithstanding the possession which he has by a licence to sell. The charge which the prisoner had in these bonds was only for the *special purpose* of receiving the interest; he is the hand only to convey them to the proper repository, and from thence to receive the interest, and be again deposited as occasion may require. There is a case made use of by *Lord Dyer*, *folio* 5. "That if a master deliver to "a servant one-and-twenty shillings in silver, to change into

(1) Vide the King v. Pares, *post*.

3 Hen. 7. 12.
21 Hen. 7. 14.
B. Cor. 58.
137.
S. P. C. 25.
Moor, 246.
Pop. 84.
1 Hale, 505.

(2) See Hudson v. Hudson, Latch.

1743.

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" gold, or to buy leather to make shoes, and he runs away " with the gold or the leather, it is felony, because the " money was delivered for *a particular purpose.*" So in this case, these bonds were delivered to Mr. *Waite* for the particular purpose of depositing them in the chest, and receiving the interest; not to sell them, and convert their produce to his own use. The statute of 15 Geo. II. c. 13. s. 12. has been adduced to prove that the prisoner's offence is not felony by the Common Law. If he were one of the description of persons whose acts of infidelity the Legislature have thereby made felonious, and the statute could be considered as introductory of a new law, the argument would certainly be conclusive; but we contend that this man had not that sort of trust, against the breach of which the Legislature intended to guard; and there are many statutes which are made to put an end to fancied doubts. This statute only takes away, *sub modo*, the benefit of clergy from the offence of larceny, in the same manner as the 1 Jac. I. c. 8. takes away clergy from a particular kind of manslaughter; but it has never been doubted but that the mode of killing therein mentioned was manslaughter before the Act. The 12 Anne, c. 7. removes the benefit of clergy from larceny in a dwelling-house to the value of 40s. but it was undoubtedly a felony to steal to that amount, either within or out of a dwelling-house, before that Act.

THE COURT were clearly of opinion, That the prisoner's offence was not felony before the 15 Geo. II. c. 13. s. 12. (*a*) and they offered *Mr. Solicitor General* A SPECIAL VERDICT; but the Counsel for the prosecution candidly acknow-

See Hassel's Case, *ante*, p. 3.

(*a*) The reason assigned for the opinion of the Court was that " the bonds were received by *Waite*, and were never put into the cellar as is usual: so that *the possession* was always in him, and the Bank had no possession but what was the possession of *Waite*, till they were brought down and placed in the chest in the cellar as usual; and DENNISON J. said, that though this might be such a possession in the Bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution." 2 East, 571.

1743. WAITE'S CASE.

ledging that they were perfectly satisfied with the opinion of the Court, the Jury were accordingly directed to find the prisoner *Not Guilty.*

A MOTION was then made for leave to charge the prisoner with *a Civil Action;* which being granted, he was accordingly charged, at the suit of the Bank, with a debt of *thirteen thousand three hundred pounds.*

THE prisoner, at the time of his arraignment, desired that his irons might be taken off; but the Court informed him, that they had no authority for that purpose until the Jury were charged to try him. He accordingly pleaded not guilty; and being put upon his trial, the Court immediately ordered his fetters to be knocked off.

Bracton, 137. Britton, 14. Fleta, b. 1. c. 31. 2 Inst. 315. 3 Inst. 34. 2 Hale, 219.

Kely. 10. 6 St. Tr. 230. 2 Hawk. c. 28. s. 1. 4 Bl. Com. 322.

1744.

CASE XV.

THE KING *against* COMER.

When the *felony* is laid to constitute the *burglary*, an acquittal of the burglary is an acquittal of stealing in the dwelling-house.

See observation on this case. 2 East, 516.

THE INDICTMENT stated, "That *John Comer*, on the 23d "April, 17 Geo. II. about the hour of one in the night, the "dwelling-house of *Bridget Berridge*, Spinster, feloniously "and burglariously did break and enter, and one diamond "necklace, of the value of 150*l.* the goods and chattels of "the said *Bridget Berridge*, in the said dwelling-house, then "and there being found, then and there feloniously and "burglariously did steal, take, and carry away, &c.

THE entry on the record was, "Puts himself on his coun- "try. Jury say, GUILTY of felony only, in stealing goods "and chattels to the value of one hundred and fifty pounds "from the dwelling-house. NOT GUILTY of the burglary."

A QUESTION arose, Whether the prisoner, by virtue of this finding, was not entitled to the benefit of clergy? and the case was reserved by MR. JUSTICE BURNET and MR. BARON CLARKE for the consideration of the Judges.

ON the 30th November 1744, nine of the Judges (1) met

(1) L. C. J. Lee, L. C. B. Burnet, and Parker. B. Reynolds, B. Clarke, and Willes, C. J. Wright, Abney, Dennison, *Justices.*

1744.

COMER'S CASE.

at Lord Chief Justice *Lee's* chambers; and they unanimously agreed, that as the felony itself was made to constitute the burglary, and not the intention to commit a felony, the acquittal of the burglary did, by necessary consequence, include in it an acquittal of the felony also; and that the prisoner, by this mistake in the mode of entering the verdict, was intitled to the benefit of the statute (*a*). But they said, that if the entry had been, "Jury say, NOT GUILTY of "breaking and entering the house in the night-time, but "GUILTY of the rest of the indictment," he would then have been convicted of stealing goods to the value of forty shillings in the dwelling-house, and would consequently have been deprived of his clergy by 12 Anne, c. 7. (1). *Vide* 1 *Hale*, 559, 560. *Sumner's Case*, Trinity Term, 1706, by all the Judges, *Comyns Rep.* 478. and the *King* v. *Francis*, Easter Term, 8 Geo. II. in B. R.

(1) See Overland's Case, *post*, and 2 Hawk. P. C. 625.

(*a*) Mr. East says that it appears by a note of MR. JUSTICE ABNEY, that WILLES, C. J. thought *the indictment* bad; that only MR. JUSTICE WRIGHT held the opinion above stated; and that the rest of the Judges were of opinion that the prisoner was ousted of Clergy on the finding of the Jury: But upon the doubt conceived by the minority, and the prisoner having laid many months in prison, they all agreed to recommend him for a pardon on the terms of transportation, 2 East, 517; and in Hungerford's Case, 2 East, 518, on an indictment for burglary and stealing £6. a verdict entered "not guilty of the burglary, but guilty of stealing above the value of 40*s*. in the dwelling-house" was held sufficient to warrant a capital judgment. But many of the Judges thought in such case an entry "*not guilty of breaking and entering in the night, but guilty of stealing, &c.*" would be more correct.

1746.

CASE XVI.

THE KING *against* ROBINSON AND TAYLOR.

AT the Old Bailey October Session 1746, *George Taylor*, and *Mary Robinson*, Widow, otherwise the Wife of the said *George Taylor*, were indicted, before LORD CHIEF JUSTICE

If a man and woman marry in the name of *another*, for the purpose of raising a specious title to the estate of *the person whose name is assumed*, it is a conspiracy. See 2 East, P. C. 1010.

1746. ROBINSON'S CASE.

WILLES, MR. JUSTICE FOSTER, and MR. BARON REYNOLDS, for *conspiring together*, that the said *George Taylor* should personate *Richard Holland*, and that the said *Mary Robinson* should be married to the said *Richard Holland*, that she might entitle herself to his estate, &c. and in pursuance of which conspiracy they were married accordingly at the parish-church of Saint Andrew, Holborn.

THE evidence was, that on the 17th July the prisoner, *Mary Robinson*, who lived as a kind of servant with Mr. *Holland*, of *Hornsey*, ordered a man to take a box from her master's house to town, and leave it at the stables where her master put up his horses. Early on the morning of the next day, she called at the stables, and left word that a man would come for the box. Accordingly the prisoner *George Taylor* called for it, and in the afternoon brought it again; after which Mrs. *Robinson* called to know if the box was brought, and desired that it might be sent to Mr. *Holland*'s, in Newgate-street. On the morning of the 18th the prisoner *Taylor* went to the office of Mr. *Rushworth*, a proctor in Doctors' Commons, and asked if he could have a marriage-licence there. On being asked whether it was for himself, he answered that it was not; and on the proctor telling him that one of the parties must come, he went away, and returned soon after to the office with Mrs. *Robinson*, whom he left there. On the same day Mrs. *Robinson* being at the Sun Tavern, in St. Paul's Church-yard, sent a porter to the East-India Warehouse in Fenchurch-street, for the prisoner *Taylor*; and in about a quarter of an hour after the porter had returned, he came, dressed in a *dark-coloured coat*, and asked where the woman was. After staying a short time, he went out, and returned again, in a *light-coloured coat*, and a light wig, which he desired the waiter to comb, telling him he need not carry it to the barber's. Mrs. *Robinson* was dressed in white sattin, with a large black bonnet over her face. This was about the hour of ten o'clock. Between ten and eleven, immediately after morning prayers, they were married at *Saint Andrew, Holborn*, by virtue of a licence, by the names of *Mary Robinson*, of the parish of *Hornsey*, Widow, and *Ri-*

chard Holland, Batchelor, of the same place. During the ceremony *Taylor* was in such agony and confusion, that the sweat ran down his face. The lady was given away by the deputy-clerk; and the coat, shirt, neckcloth, and wig which *Taylor* had on, were proved to be *the real Mr. Holland*'s own clothes, which Mrs. *Robinson* had the day before sent in the box to the Livery-Stables. Being thus married, they went to the King's Head Tavern, in *Holborn*, where they dined; after which *Taylor* went to Mr. *Standgate*'s, in Holborn, where he had dressed, and replacing Mr. *Holland*'s clothes in the box, and putting on his own, he carried it to the Livery-Stables; from whence it was sent, by the desire of Mrs. *Robinson*, as before mentioned, to Mr. *Holland*'s house, in Newgate-street. The wig, however, by some accident, was missing from the box, which, with something Mr. *Holland* had heard, gave rise to a suspicion of what had been going on; and he accordingly caused the prisoners to be apprehended, when both of them made a full confession of the facts above related.

1746.

ROBINSON'S CASE.

UPON this evidence it was contended by the Counsel on the part of the prisoners, that by the Common Law people may marry by whatever name they please; and although the indictment charges, that in the present case it was a conspiracy, yet they have not proved that any one has in fact been injured, or that it was done with any view or intent that a third person should suffer any injury from it. Many reasons may exist which may make it expedient for people to marry in fictitious names, which may by accident be the names of other persons; but it is not the imagination of such third person that they are thereby injured, which will make the parties guilty of an offence. It must be made out that there has been a combination to affect the interest, or injure the estate of a third person, before any such act can be construed a conspiracy; for a conspiracy must be to do an injury to the person or estate of another.

THE COURT, however, over-ruled the objection; and observed, that it was the province of the Jury to collect from

8 Mod. 11. 20. 1 Blac. Rep. 392. Stra. 144. 193. 1 Hawk. 318

1746. all the circumstances of the case, whether there was an intention or design in these parties to do a future injury to Mr. *Holland*; and that it was not necessary to prove any direct or immediate injury, or even to shew any specific overt act of conspiracy.

ROBINSON'S CASE.

THE Jury found the prisoners guilty of conspiracy; *Mary Robinson* was imprisoned two years in Newgate, and *George Taylor* six months in the Poultry Compter.

1747.

CASE XVII.

THE KING *against* HAINES.

A convict allowed the benefit of a general pardon, though he had neglected to pray it in proper time.

AT the Summer Assizes 1747 for the County of *Worcester*, *Richard Haines* was convicted upon an information of *mayhem*. An Act of Grace, including this offence, had passed between the time of pleading *Not Guilty* and the trial; but the defendant, on being arraigned, had neglected to take advantage of it.

IN the Michaelmas Term subsequent to the conviction, the defendant moved the Court of King's Bench that he might have the benefit of the Act; and a rule was granted to shew cause.

MR. BATHURST, for the Crown, contended, that as the defendant had neglected to pray the benefit of the Act at the time of his trial, he now came too late; and 2 *Hawk.* c. 37. s. 59. *Kely.* 24. *Jenk. Cent.* 129. *Hale*, 252. and *Ratcliffe's Case* (1) were cited.

(1) Foster, 43. 1 Wils. 150.

MR. EVANS, for the defendant, said, that the practice of the Old Bailey was to plead *Guilty*, and then to claim the benefit of the Act; but as the defendant had pleaded *Not Guilty* before the Act passed, he could not take advantage of it until the Jury had found him guilty; for no man can have occasion to require a pardon until he has either confessed himself guilty, or a Jury has found him so.

THE COURT took time to consider of the case till Easter Term 1748; and they then delivered their unanimous opi-

S. P. C. 169. 173. Bro. Cor. 200.

nion, That the defendant was intitled to the benefit of the Act of Grace: but they ordered, that he should pay to the prosecutor his full costs out of pocket, and gave particular directions to the Master accordingly.

1747.

HAINES'S CASE.

1750.

THE KING *against* WILLIAM PARKER.

CASE XVIII.

Having the possession of counterfeit money *with intention* to pay it away as and for good money, is an indictable offence at common law.

AT the Summer Assizes at *Rochester* in *Kent*, in the year 1750, *William Parker* was indicted for a *misdemeanor*, for unlawfully having in his custody a counterfeit half-crown, two counterfeit shillings, and twelve counterfeit sixpences, made of base metal, to the likeness of true money, knowing the same to be counterfeit money, *with intention to pay away the same as true and lawful money*, against the peace of our Lord the King, his crown and dignity; and upon which indictment he was convicted upon very clear and satisfactory evidence.

BUT MR. JUSTICE DENNISON, doubting whether this was an offence indictable at Common Law, and in regard no notice was taken of any such case in the Statute 15 & 16 Geo. II. c. 28. respited the judgment, and reserved the question, for the consideration of THE TWELVE JUDGES:

WHETHER the said offence was indictable or not?

THE prisoner was accordingly ordered to remain, or to give bail for his appearance at the next assizes at *Maidstone*; but on 18 March 1751, the Judges not having delivered any opinion on the subject, he was ordered by MR. JUSTICE FOSTER, the then Judge of Assize, to remain, or give bail, as before ordered.

THE Solicitor of the Mint obtained a writ of *Certiorari* in the Easter Term following; and the Conviction, with the Record at large, was returned into the Crown Office accordingly.

BUT after a lapse of some time, the prisoner was, by consent of the Solicitor for the Crown, discharged from his

1748.

SCOREY'S CASE.

THE COURT, on full affidavit of the fact, admitted him to bail; himself in four hundred pounds, and four sureties in two hundred pounds each; and granted a rule against the Coroner to shew cause why an Information should not be filed against him.

1756.

CASE XXI.

THE KING *against* MACDANIEL AND OTHERS.

A person cannot be indicted for murder in procuring another to be *executed*, by falsely charging him with a crime of which he was innocent.

AT the Old Bailey January Session 1754, one *Joshua Kidden* was tried before MR. JUSTICE FOSTER, for robbing *Mary Jones*, Widow, on the highway of one guinea, a half-crown, and two shillings and six-pence. The prosecutrix swore very positively to the person of the prisoner, and to the circumstances of the robbery, in which she was confirmed by one *Berry*. The prisoner, on the evidence of these two witnesses, was convicted and EXECUTED; and on the 1st of March following, the reward of forty pounds, given by 4 and 5 Will. and Mary, c. 8. to those who shall convict a Highway Robber, was divided between the prosecutrix *Mary Jones*, *John Berry*, *Stephen Macdaniel*, and *Thomas Cooper*. The history of this prosecution lay concealed in the minds of its fabricators until the 9th of August 1754, when the High-Constable of the Hundred of Blackheath having taken up one *Blee* on suspicion of being a thief, it was discovered to have been a conspiracy and contrivance to obtain the reward.

1 East, 333.

DILIGENT search was accordingly made to apprehend the miscreants concerned in this extraordinary transaction; and at the Old Bailey in June Session 1756, *Stephen Macdaniel*, *John Berry*, and *Mary Jones*, were indicted before MR. JUSTICE FOSTER, present MR. BARON SMYTHE, for the wilful MURDER of *Joshua Kidden*, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward, &c. The prisoners were convicted, upon the clearest

and most satisfactory evidence, of the fact; and a scene of depravity was disclosed, as horrid as it was unexampled. The judgment, however, was respited, upon a doubt whether an indictment for murder would lie in this case. The special circumstances were accordingly entered upon the record, together with an additional finding of the Jury, "That Justice-Hall, in the Old Bailey, is situated within the County "of the City of London; and that felonies committed in "the County of Middlesex have from time immemorial been "accustomed to be tried there;" in order that the point of law might be more fully considered, upon motion in arrest of judgment. But Sir ROBERT HENLEY, *the Attorney-General*, declined to argue it; and the prisoners were, at a subsequent session, discharged from that indictment.

1756.

MACDANIEL, BERRY, AND JONES'S CASE.

SIR *William Blackstone* however says, that there were grounds to believe, it was not given up from any apprehension that the point was not maintainable, but from other prudential reasons.

See also 1 East, 333 *notis*.

IN May Session 1759, they were again put to the bar, upon an indictment for conspiring to defeat the public justice of the kingdom, in causing *Joshua Kidden* to be executed for a robbery, which they knew he was innocent of, with intent to get into their possession the reward offered by Act of Parliament; but no evidence appearing, they were all three acquitted.

But see Foster's Crown Law, 130.

1754.

CASE XXII.

THE KING *against* THOMAS POW.

AT the Admiralty Session, at the Old Bailey, held the 25th February 1754, before MR. BARON ADAMS, SIR THOMAS SALUSBURY, KNT. Judge of the High Court of Admiralty, SIR THOMAS BIRCH, KNT. &c. &c. *John Lancey* and *John Lloyd* were indicted on 11 Geo. I. c. 21. for unlawfully burning and destroying the ship *Nightingale*, whereof *Thomas Benson*, Esq. was owner, with intention to defraud the underwriters therein named; and *Thomas Pow* was charged in

A person who is accessary to a felonious shipwreck is not within 4 Geo. I. c. 12. unless he *belongs* to the ship. S. C. 2 East, 1099.

1754. the same indictment as an accessary before the fact, for counselling, advising, &c. the said *Lancey* and *Lloyd* to commit the felony aforesaid.

POW'S CASE.

THE EVIDENCE.—*Benson*, the owner of the ship, rented the island of *Lundy*, situated in the mouth of the Bristol Channel, near the middle, between Devonshire and Pembrokeshire, *Long.* 4. 40. *W. Lat.* 60. 25. *N.* but within the county of Devon. *Pow* was a Taylor and Salesman, living near the Point of *Appledore*, a town in Kent, seated on the river *Rother*, not far from its influx into the sea, *Long.* 0. 50. *E. Lat.* 50. 45. *N.* The ship was freighted with salt, dry goods, maunds of pewter, and a cask of combustibles, and insured by *Benson* for 400*l.* from *Appledore* to *Maryland*. *Pow* shipped the seamen on board at *Appledore*; and she sailed from thence to *Lundy Island*, where the dry goods and pewter were unloaded, and buried under ground among the rocks. While the vessel lay in *Lundy Road*, in fourteen fathom water, *Pow* went on board her, and gave several of the crew notes of hand, promising to pay them a certain sum of money, as a compensation for their clothes, &c. *in case the ship was lost by any misfortune, between that place and the Cape of Virginia on her outward-bound passage. Pow* returned on shore; the ship set sail; and the morning after, *Lancey*, the Captain, gave orders to set the ship on fire, which was accordingly done.

THE Jury acquitted *Lloyd*, and found *Lancey* Guilty (1). They also found specially, "That *Thomas Pow*, before the "said felony was committed by *Lancey*, did, near the island "of *Lundy*, within the county of *Devon*, incite, move, instigate, stir up, and counsel the said *John Lancey* to commit the same; but that the said *Thomas Pow* was neither "*Owner*, *Master*, *Captain*, or *Mariner* of the said ship."

(1) He was executed at Execution Dock on Friday, June 7, 1754.

UPON this verdict two questions were submitted to the opinion of the Judges.

FIRST, Whether an accessary *upon the land* to the offence of burning a ship, which offence is afterwards committed *upon the high seas*, is within the jurisdiction of the Court of Admiralty? or, Whether he ought not to be indicted and

tried at the Assizes for the County within which *his* offence was committed? 1754.

POW'S CASE.

SECONDLY, Whether *Thomas Pow*, being a person in trade, living at *Appledore Point*, and found by the verdict not to be either *Owner*, *Master*, *Captain*, or *Mariner* of the vessel burnt, is within the meaning of the 4 Geo. I. c. 12. explained by 11 Geo. I. c. 29. s. 6. upon which the indictment is founded; that statute only saying, "That if any *Owner*, *Captain*, *Master*, *Mariner*, or other *Officer* belonging to any ship shall wilfully cast away, burn, or otherwise destroy, the ship of which he is owner, or unto which he belongeth, or in any manner of wise procure the same to be done, to the prejudice of the underwriter, &c. he shall suffer death without clergy."

THE JUDGES were of opinion, That *Thomas Pow*, upon the finding of the Jury, was not an offender within the meaning of the 4 Geo. I. c. 12. and 11 Geo. I. c. 29. (*a*) but they gave no opinion upon the first point.

(*a*) These statutes, as to the clauses in question, are now repealed by 43 Geo. III. c. 113. and other provisions made upon this subject.

1756.

CASE XXIII.

THE KING *against* HARRISON.

A prisoner cannot be found guilty of stealing goods, if it appear that he could not otherwise get them than by the delivery of the prosecutor's wife. S. C. 2 East, 559.

AT the Old Bailey, in February Session 1756, *Nathaniel Harrison* was tried before MR. BARON ADAMS, present MR. JUSTICE DENNISON and MR. JUSTICE BATHURST, for stealing a silver tankard, and three silver castors, the property of *James Cobb*.

THE prisoner was an apprentice to the prosecutor. The prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up. It appeared that she had pawned some articles of it, in order to supply the prisoner with pocket-money, but the articles she pawned were not those mentioned in the indictment. The prisoner confessed, that he took the articles mentioned

1756.

HARRISON'S CASE.

in the indictment from the closet; and a pawnbroker proved, that he received them in pledge from the prisoner; but it did not appear by what means the prisoner had gained access to the closet from which they were taken.

Pulton, 129.
21 Hen. VI. 455.
3 Inst. 110.
Dalt. c. 157. p. 504.
1 Hale, 514.
Hale's Sum. 64.
1 Show, 52.

THE COURT held, That the prosecutor's wife having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without *her privity or consent*, it might be presumed that he had *received it from her;* and he was accordingly acquitted.

1759.

CASE XXIV.

THE KING *against* THOMAS USHER.

If a banker pay a forged draft, and do not debit the account of the person whose name is forged with the payment, such person is a good witness to prove the forgery.
S. C. 2 East, 999.

AT the Old Bailey October Session 1759, *Thomas Usher* was tried before MR. BARON SMYTHE, present LORD MANSFIELD and MR. JUSTICE WILMOT, for forging an acceptance to a bill of exchange, in the name of *Anthony Merry*, for the payment of 250*l.* and for publishing the same, knowing it to be forged, with intent to defraud *Sir Charles Asgill and Co.*

THE Bill was as follows:

"*Ex*^{n}. *pa*^{r} 250*l. sterling.* LAOS DEO, *Malaga*, 5 *Feb.* 1758.

"AT usance and half, pay this our first *per* exchange, to "Mr. *Domingo Gueico*, or order, 250*l.* sterling, value re- "ceived of the same; which place to account, as per advice "from

"THOMAS QUILTY and Co."

"To Mr. *Anthony Merry*,
"Merchant in LONDON."

THE bill purported to be accepted by Mr. *Merry*, and to be payable at *Sir Charles Asgill's and Co.*

THE prisoner had lived in the capacity of Cash-keeper to Mr. *Merry*, a Spanish Merchant; and the fact of his having uttered this bill, and of his having received the money for it of *Sir Charles Asgill and Co.* were clearly proved. It also appeared that *Asgill and Co.* had charged Mr. *Merry*'s ac-

unt with this payment; but afterwards, being fully per-aded, from what Mr. *Merry* told them, that it was a for-ry, they gave Mr. *Merry*'s account *a credit* for the same m.

To prove that the acceptance was forged, the Counsel for e prosecution called Mr. *Merry* himself. The prisoner's unsel objected to the competency of his evidence, unless he oduced a release from *Sir Charles Asgill and Co.*

THE COURT said, That as *Sir Charles Asgill*'s BANKING-[OUSE was thoroughly satisfied of its being a forgery, and id settled their accounts not charging Mr. *Merry* with the yment, or making him any way debtor for the bill, it was rfectly immaterial to Mr. *Merry*, whether the prisoner was nvicted or acquitted, for there could be no demand upon m for the 250*l.*: and upon this ground the objection was er-ruled.

See same point, Testick's Case, 2 East, C. L. 925, 926; and Wells's Case, Buller's N. P. 289.

THE KING *against* SARAH TAYLOR.

CASE XXV.

AT the Lent Assizes held at *Rochester*, in and for the ounty of *Kent*, on Monday the 19th March, 33 Geo. II. fore the HON. HENEAGE LEGGE, Esq. one of the Barons the Exchequer, *Sarah Taylor*, late of the parish of *Dart-rd* in the said County of *Kent*, was indicted, for that she on e 26th June 1759, about the hour of ten, in the night of e same day, a certain *outhouse* of one *William Quelch*, com-only called a *Paper-mill*, feloniously, voluntarily, and ma-iously did set fire to, against the statute, &c.

Setting fire to paper in a *drying loft* belonging to a *paper-mill* is not setting fire to an *outhouse*, within the meaning of 9 Geo. I. c. 22. 2 East, 1020.

IT appeared in evidence, that the prisoner had set fire to a rge quantity of paper, which was drying in a loft annexed id belonging to the mill, but not to any part of the mill it-lf, nor was any part of the mill consumed.

THE Jury found the prisoner guilty; but Mr. Baron *Legge* aving expressed a doubt, whether *a Paper-mill* could be nsidered as *an outhouse* within the meaning of that branch the BLACK ACT upon which the indictment was founded,

1759. the judgment was respited; and the following questions submitted to the consideration of the Judges:

TAYLOR'S CASE.

See 43 Geo. III. c. 58.

FIRST, Whether *a mill* can be considered as *an outhouse* within the meaning of the 9 Geo. I. c. 22. which enacts, "That if any person shall set fire to any house, barn, or "*outhouse*; or to any hovel, cock, mow, or stack of corn, "straw, hay, or wood, &c. they shall be guilty of felony, "without the benefit of clergy?"

SECONDLY, Whether setting fire to paper in a drying-loft belonging to a mill can be considered as setting fire to the mill?

AT the next Assizes on the 24th June 1760, MR. JUSTICE FOSTER certified that the prisoner's case having been laid before *him* at the last Assizes for the County of *Kent*, he had, on his return from the circuit, conferred upon the same with the other Judges of the Court of King's Bench; and that they all agreed, that the prisoner not having set fire to any part of the mill, and no part of the mill having been consumed, her case was not within the statute upon which she was indicted, and therefore he had recommended her as a person intitled to a free pardon.

Signed M. FOSTER, 24th *June* 1760.

THE PRISONER was accordingly admitted to bail for her appearance at the next Assizes to be holden for the County of *Kent*, after notice that she was inserted in the next general pardon that should issue for the convicts upon the Home Circuit. Upon her entering into the usual recognizance, therefore, she was discharged.

1761.

CASE XXVI.

THE KING *against* MORRIS.

What evidence is necessary in perjury.

AT the Sittings after Easter Term 1761, in the King's Bench, *John Morris* was tried before LORD MANSFIELD for wilful and corrupt perjury, in an answer in Chancery.

No evidence was given of the identity of the person who swore the answer, nor was it proved that any person at all

had sworn it; but the name subscribed to the answer was proved to be the hand-writing of the defendant; and Master *Bennet* proved that the *jurat* was subscribed by him; but he had no recollection of the person of the defendant. 1761.

MORRIS'S CASE.

THE defendant's Counsel contended, that this evidence was not sufficient, for it was necessary to prove that the defendant was the very same person who had signed the answer, and that he had actually sworn the answer to be true; but LORD MANSFIELD over-ruled the objection, and the defendant was convicted.

See 1 Show, 397.

See Rex *v.* Brady, July Session 1784, *post.*

IN the Trinity Term following he was brought up for judgment; and his Lordship, in making his report of the evidence, stated to Mr. Justice *Dennison*, and Mr. Justice *Wilmot* (*Foster* absent), the objection which had been made at the trial, and desired to have the opinion of the Court upon the point.

THE COURT. The name subscribed to the answer was proved to be the hand-writing of the defendant, and it was proved that the *jurat* was subscribed by the Master, as being sworn before him: this is sufficient proof that the defendant is the *same person*, and that *he* actually swore the answer he subscribed. The order of the Court of Chancery, "that all "defendants shall *sign* their answers," was intended to facilitate the proof of perjury; and a *jurat* attested by the proper person before whom the oath ought to be taken, is sufficient proof of its being actually sworn by the person whose name is signed; at least so far as to put it upon him to give some probable evidence that he was personated; as it would otherwise be difficult, and perhaps impossible, to convict any one of perjury committed in an answer to a bill in Chancery.

2 Burr. 1189.

1763.

THE KING *against* WILLIAM LEE.

CASE XXVII.

AT the Old Bailey July Session 1763, *William Lee* was indicted on the COVENTRY ACT, 22 and 23 Car. II. c. 1. before

A husband cutting his wife's throat quite across, while they are in bed, is not a maiming, or lying in wait, within the 22 and 23 Car. c. 1.

1763. LEE'S CASE.

LORD CHIEF BARON PARKER, present MR. JUSTICE BATHURST and MR. JUSTICE WILMOT, for that he, contriving and intending *Agnes* his wife to maim and disfigure, on purpose and of malice aforethought, by lying in wait, did make an assault with a certain razor, and the neck of the said *Agnes* did cut, &c. with intent to maim and disfigure.

THE facts were, that the prisoner returned home one night, after his wife and two children were a-bed and asleep, and cut his wife's throat with an old razor which he had concealed in his stocking, making a wound about three inches in length quite across her neck; but providentially it was not mortal.

THE words of the Act of Parliament are, "That if any "person shall on purpose, and of malice forethought, and by "lying in wait, unlawfully cut out, or disable the tongue, "put out an eye, slit the nose, cut off a nose or lip, or cut "off or disable any limb or member of any subject of his "Majesty, with intention in so doing to maim and disfigure, "that then the person or persons so offending shall suffer "death without clergy."

THE prisoner's Counsel submitted to the Court, that the evidence did not prove any offence within the statute.

THE COURT were of the same opinion; and the prisoner was accordingly acquitted.

1764.

CASE XXVIII.

THE KING *against* JOHN LEIGH.

Dollars, or Portugal money, not current by proclamation, are not goods, within the meaning of the 24 Geo. II. c. 45.

AT the Old Bailey in February Session 1764, *John Leigh* was indicted on the statute of the 24 Geo. II. c. 45. before MR. JUSTICE GOULD, present MR. BARON PERROTT, for stealing sundry articles of wearing-apparel, value twenty-one shillings, two *dollars* value nine shillings, and two *guineas*, the property of *John Lockhart*, being in a certain ship called the *Devonshire*, lying on the river *Thames*.

THE larceny of all the property laid in the indictment was very clearly proved; but the Act of Parliament takes away

1764.

LEIGH'S CASE.

the benefit of clergy from those only who shall "steal any "*goods*, *wares*, or *merchandise*, of the value of forty shil- "lings in any vessel upon any navigable river." It was therefore submitted to the Court, that the *dollars* and the *two guineas*, being *money*, were not within the description of either *goods*, *wares*, or *merchandise*; and as the value of the other articles did not amount to *forty shillings*, the prisoner must be acquitted of the capital part of the charge.

THE COURT were of this opinion; and the prisoner was found guilty of the single felony only (*a*).

(*a*) At *Maidstone* Lent Assizes 1752, *George Grimes* was indicted on this statute, for stealing a considerable sum of money out of a ship in port; and it was ruled, that money was not within the meaning of the Act, though great part of it consisted of *Portugal money*, not made current by proclamation, but commonly current. Foster, 79. 2 East, 646.

THE KING *against* JOHN JONES. CASE XXIX.

Forging an order in the name of a silversmith for the re-delivery of plate from Goldsmiths' Hall, viz. "Please to deliver my work to the Bearer," is within the 7 Geo. II. c. 22. and 13 Geo. III. c. 26.

S. C. 2 East, 941.

AT the Old Bailey October Session 1764, *John Jones* was indicted before MR. BARON SMYTHE, present LORD MANSFIELD, and MR. JUSTICE BATHURST, for forging an order for the delivery of goods, to this purport:

"SIR, *September* 23, 1764.

"Please to deliver my work to the Bearer.

"LYDIA BELL,

"*Fleet-street, London:*"

with intent to defraud the Wardens and Company of Goldsmiths.

IT appeared in evidence, that Mrs. *Bell* was a silversmith, and had sent two silver tankards, and two silver cups with covers, by *John Harper*, her apprentice, to Goldsmiths' Hall to be marked; that the form of the order is the same as is usually sent upon such occasions; except that in strictness,

1764. JONES'S CASE.

and by the rule of the Plate-Office, the several species of work, with the weight of the silver, ought to have been mentioned in it. It was proved by an accomplice, that the prisoner had written the note, and signed the name of "LYDIA BELL, *Fleet-street*," to it.

THE Jury found the prisoner *Guilty*. He moved, however, in arrest of judgment, upon the form of the order. The case was reserved for the opinion of the Judges, and the conviction was affirmed; but in September Session 1766, the prisoner received pardon on condition of transportation.

CASE XXX.

THE KING *against* JOHN MORGAN.

A *Mahometan* may be sworn on the *Alcoran* in a prosecution for a capital offence.

AT the Old Bailey December Session 1764, *John Ryan*, *Mary* his wife, and *Jeremiah* his son, were indicted before MR. BARON ADAMS, present MR. JUSTICE WILMOT, for stealing several articles of wearing-apparel, a quantity of Bengal coins, and five guineas, the property of *John Morgan*, in the dwelling-house of the said *John Ryan*.

2 Keb. 314.
1 Wils. 34.
2 Atk. 21.
1 Sid. 6.
1 Hale, 634.
2 Hale, 279, 283.
Stra. 821, 1104.
Cowp. 390.
2 Eq. Ca. Ab. 397.
Burr. 1117.

IT appeared that the prosecutor, *John Morgan*, was a *Mahometan*. The prisoners were therefore remanded, in order to take the opinion of the Twelve Judges, whether a *Mahometan* could be permitted to swear on the *Alcoran*, in a prosecution for a capital offence.

IN February Session 1765, MR. JUSTICE GOULD delivered it as the unanimous opinion of the Judges, that he might be so sworn.

AN *Alcoran* was accordingly produced. The witness first placed his right hand flat upon it; put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head: He then looked for some time upon it; and on being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth (*a*).

(*a*) "The form in oaths," says Puffendorf, book 4. ch. 2. s. 4. "under

THE prisoners were found guilty of stealing, but not in the dwelling-house. 1764.

MORGAN'S CASE.

which God is invoked as a witness, or as an avenger, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain and insignificant to compel a man to swear by a God whom he doth not believe, and therefore doth not reverence; and to one thinking himself bound to the Divine Majesty in any other words, or under any other titles than what are agreeable to the doctrines of his own religion, which, in his judgment, is the only true way of worship; and hence likewise it is that he who swears by false gods, yet such as are by him accounted true, stands obliged, and if he deceive is really guilty of perjury; because whatever his peculiar notions were, he certainly had some sense of the Deity before his eyes, and therefore by wilfully forswearing himself he violated, as far as he was able, that awe and reverence which he owed to Almighty God."

1765.

THE KING *against* BARNEY CARROLL.

CASE XXXI.

AT the Old Bailey in July Session 1765, *Barney Carroll* and *William King* were indicted before LORD CHIEF BARON PARKER, present MR. JUSTICE GOULD and MR. JUSTICE YATES, on the 22 and 23 Car. II. c. 1. s. 7. for that "he "did on purpose, and of malice forethought, and by lying "in wait, feloniously and unlawfully make an assault upon "*Cranley Thomas Kirby*, Esq. with intention to maim and "disfigure him; and with a certain knife did on purpose, "and of his malice forethought, and by lying in wait, unlawfully and feloniously *slit the nose* of the said *Cranley Thomas Kirby*, with intention in so doing to maim and "disfigure him. AND THAT *William King*, at the time of "the committing the said felony, was present, counselling, "aiding, and abetting the said *Barney Carroll* to commit "the felony aforesaid."

What kind of *cut* shall be considered *a maim*, within the Coventry Act. S. C. 1 East, 394. See the indictment at large. Crown Cir. Assistant, 219.

THE prosecutor, about ten o'clock at night, had apprehended a young pickpocket, near *Somerset-house* in the *Strand*. Upon his threatening to take him before a Ma-

1765.

CARROLL'S CASE.

gistrate, the prisoner *Carroll*, who appeared to have been lurking under the side of the *New Church*, immediately came up and followed the prosecutor while he was conducting the boy towards *Temple-bar*, walking sometimes before, and sometimes behind them, until they came to the top of *Arundel-street*, where the prisoner, who was at this time before Mr. *Kirby*, waited till he came up, and then gave him a violent blow across the nose and eyes with a razor-bladed knife, saying, "Damn you, Sir, let the boy go." It was also proved by two boys, accomplices, that all four of them had that evening gone out to pick pockets, under an agreement that the prisoners were to strike or stab, or cut the nose and eyes of any person who apprehended them; that *Carroll* had agreed that he would either stab or cut off the nose of the first man that molested them; and that he had actually laid in wait, and followed the boys for that purpose, above two hours and a half before they met Mr. *Kirby*. The wound bled profusely; and upon examination it appeared that a knife or sharp instrument had penetrated under the arch of the right eye, near the nerve that supports the eye-lid, and endangered it; that the knife had passed athwart the upper part of the nose, the flesh of which was cut or slit, and the bone laid bare, the frontal blood-vessels of the forehead *divided*; and that the wound passed from the nose between the brow and lid of the left eye, and terminated in the left temple; and that a nerve was cut.

It also appeared upon the testimony of several surgeons, that in *Wiseman*, and many other old authors who have written on Surgery, such a wound is called a *slit*, which is an old surgical term synonymous with fissure, incision, or gash; that "*slit*" is not a word of modern use in Surgery; but that the idea which was formerly conveyed by that word, is now expressed, in speaking technically, by the word *divided*.

The Jury found the prisoners guilty. But it was questioned, Whether such *a cut* was a *slitting* within the letter of the Act, the wound being *transverse*, and not having

perforated to the nostril; and the statute, of Elizabeth, which directs the slitting of the nose by way of infamous punishment, expressly directing that the nostrils shall be slit (*a*)?

1765.

CARROLL'S CASE.

BUT the Court were of opinion, that the slitting of the nose was not confined to any particular form or direction, but that any division of the flesh or gristle of the nose, whether perpendicular or transverse, came within the denomination of *a slit*, and was equally a disfiguring of the party.

See Rex *v.* Coke and Woodburn, 6 State Trials, 612. 1 East, C. S. 400.

The case however was reserved for the Judges, who thought the offence as described in the indictment had been properly proved; and the prisoners were *executed* on the 31st July 1765, pursuant to their sentence.

(*a*) It seems also that there was some doubt whether in this case there was a sufficient *lying in wait*; and it is said that upon the conference of the Judges, MR. JUSTICE WILLES and MR. BARON EYRE, who leant most to a strict construction of the words "lying in wait for the purpose &c." yet were of opinion, that the circumstance of *Carroll*'s passing before Mr. *Kirby*, and waiting till he came up, and then giving him the wound, was a lying in wait within the statute. 1 East, P. C. 397, 398.

THE KING *against* ELIZABETH DUNN.

CASE XXXII.

AT the Old Bailey September Session 1765, *Elizabeth Dunn* was indicted on the statute 2 Geo. II. c. 15. s. 1. before JAMES EYRE, Esq. *Recorder*, for forging and uttering a promissory note for the payment of money, in the words and figures following:

To make a *mark* in the name of *another person* with intent to defraud the person whose name is assumed, is forgery. S. C. 2 East, 962.

"*London*, July 27, 1765.

"I PROMISE to pay to Mr. *Edward Hooper*, or order, the "sum of three *(omitting the word pounds)* thirteen shil- "lings and sixpence, seven days after date, value received "by me,

"*Witness, John Whettall.*

her

"*Mary* ⋈ *Wallace.*"

mark.

with intention to defraud the said *Edward Hooper*.

1765.

DUNN'S CASE.

THE second count laid it to be with intent to defraud the person intitled to receive the wages due for the service of *John Wallace*, deceased, late seaman on board his Majesty's ship *L'Epreuve*.

IT appeared upon the evidence, that Mr. *Hooper* was a Prize-Agent, and that the prisoner in June 1765 applied to him, at his office for receiving seamen's wages, in the name *Mary Wallace*, with the probate, or pretended probate, of the will of her husband, *John Wallace*, in which probate *Mary Wallace* was named his executrix; in consequence of which he made search, and found there were wages due to *John Wallace*; but he refused to pay her until she produced a certificate of her being the *Mary Wallace* named in the will. She however pleaded poverty, and prevailed on him to lend her five shillings. She afterwards produced the certificate; but as the money could not be immediately got, she begged he would let her have a little more, on the credit of the wages due to *John Wallace*. In consequence of her importunity, he advanced three guineas and a half. He then wrote the body of the promissory note above described, and called his lad, who saw her make her mark. *Hooper* then asked her, what name he must write over the *mark?* To which she answered, "You know my name well enough, I "told you before it was *Mary Wallace*." *Hooper* then wrote over her mark, "*Mary Wallace, her mark*," and his lad witnessed it (*a*). It was however clearly proved that her name was *Elizabeth Dunn*, and not *Mary Wallace*; and that the whole account she had given was a fabrication.

THE Jury found the prisoner guilty; but THE RECORDER having doubts whether, as the note, though made by the prisoner in an assumed name and character, was her own

(*a*) The Recorder, it seems, at first doubted whether as the words "*Mary Wallace, her mark*," and the words "*Witness John Whettall*," were not in the note when she made her mark ⋈, the evidence proved that she had forged a note of the *tenor* charged in the indictment. But Mr. Baron Perrott and Mr. Justice Aston, whom the Recorder consulted, were of opinion that in this respect the indictment was well proved. 2 East, P. C. 976.

note, made and offered as her own, and not as the note of another in contradiction to herself, the offence was a forgery, he postponed the sentence, and reserved the case for the opinion of THE TWELVE JUDGES. 1765. DUNN'S CASE.

ON the 6th November 1765, all the Judges, excepting LORD CAMDEN and MR. BARON ADAMS, met at Serjeants-Inn-Hall, to consider this case.

MR. JUSTICE ASTON was of opinion, that this was no forgery, but at most a mere *fraud*, in assuming a false name. That to constitute a forgery, the *instrument itself* must be false; and the merely assuming of a fictitious name to it will not make the instrument itself a forgery. But here the note was really and truly the note of the prisoner herself, and was given and subscribed by her as her *own* note in the presence of *Hooper* and his clerk; and though she subscribed it by a fictitious name, she might be sued upon this note as effectually as if she had signed it with her own true name, and consequently the prosecutor had his remedy upon it. See the first Vol. of *Collectanea Juridica*, from which the arguments in this case are taken.

BUT the nine other Judges were of opinion, that this was a capital forgery. They agreed, that in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note *entirely as his own*, his subscribing it by a fictitious name will not make it a forgery, the credit being there wholly given to *himself*, without any regard to the name, or without any relation to a third person. But they thought that an instrument which is altered as the act and instrument of another, and in that light obtains a superior credit, when, in truth, it is not the act of the person represented, is strictly and properly *a false instrument*; for in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of the third person, whose situation and circumstances import a superior security for the debt: and therefore, if in truth it is *not* the instrument of that third person, whose name and situation induced the credit, it is certainly *a* Lord Mansfield, Parker, C. B. Clive, J. Smythe, B. Bathurst, J. Wilmot, J. Gould, J. Perrott, B. Yates, J.

1765.

DUNN'S CASE.

false instrument, and the intention fraudulent to the party imposed upon by it; for he believed, when he accepted the security, that he had a remedy upon it against the third person in whose name it was given, and on whom he relied when he advanced the money: but this being false, he has no such remedy, and therefore is materially deceived (1). In this respect the case is very different from that of a person borrowing money upon his own note, and merely assuming a fictitious name, without any relation to a different person; for *there* the whole credit is given to the *party himself;* the lender accepts the security as the security of that person only; he has no other remedy in view but merely against the man he is dealing with; and the security itself is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has therefore a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded. But in the present case no credit was given to the prisoner herself personally, for she was totally unknown both to *Hooper* and his clerk; the money was refused on her first application; and a certificate required that she was the *same Mary Wallace, the widow and executrix of the seaman.* It was not till she brought the probate, and from thence and her own representation appeared to be the executrix of *John Wallace*, (and as such entitled to his wages,) that he would advance the money to her. In that character and capacity she gave the note, and virtually directed the clerk to write the name of *Mary Wallace* over her mark (as the name she had told him before); it was therefore upon the supposed note of *Mary Wallace*, the executrix of the seaman, that this money was advanced: by this note the prosecutor believed that he had a remedy against that executrix, and that the wages of her husband would be a fund for repaying him. It now turns out that this was *not* the note of *John Wallace's* executrix, and that he has *no* remedy upon it against the person whose note it purported to be, and on whom he relied; it was therefore a *false note*, and as such within the words of the Act of Parliament. Whether, in fact, there

(1) See the case of Mead *v.* Young, 4 Term Rep. 28. and the case of Brown and Parker, *post*, Sept. 1796.

1765.

DUNN'S CASE.

be any such person as *Mary Wallace*, executrix of *John Wallace*, a seaman, is totally immaterial. If an instrument be false in itself, and by its purporting to be the act of another, a credit is obtained, which would not otherwise have been given, it is a forgery; though the name it is given in be really a non-entity, as was decided in the case of *Ann Lewis* (1). Had the note in question been brought by the prisoner *ready signed* with the name of *Mary Wallace*, executrix of *John Wallace*, and she had so obtained the money, it could hardly have been doubted but this would have been uttering a forgery. And what difference can it make that she signed that name (under the same misrepresentation) in the presence of the prosecutor, as the prisoner was an absolute *stranger* to him? He had no better means of knowing whether this was the note of *Mary Wallace*, than if she had signed it before she came thither. The falsity of the note and the fraud upon the prosecutor were precisely the same. Upon the whole, the nine Judges above-mentioned were of opinion, that the prisoner was liable to a sentence of death. But at a subsequent meeting it was agreed, that as MR. JUSTICE ASTON was of a different opinion, it would be proper to recommend the prisoner to mercy.

(1) Foster, 116.

1766.

CASE XXXIII.

THE KING *against* JAMES GIBSON.

Forging a paper writing purporting to be *an office-copy* of a report of the Accountant-General's, of money being paid into the Bank; *and also* an office-copy of a certificate of one of the Cashiers of the Bank, is within the statute 12 Geo. I. c. 32. s. 9. S. C. 2 East, 899.

AT the Old Bailey in January Session 1766, *James Gibson*, an Attorney, was indicted on the statute of 12 Geo. I. c. 32. before LORD CHIEF BARON PARKER, MR. JUSTICE GOULD, and MR. JUSTICE YATES, for forging a certain instrument in writing, *purporting* to be "*an office-copy* of a report of *the Accountant-General*, of money being paid into the Bank pursuant to an order of Chancery," AND ALSO "*an office-copy of a certificate of one of the Cashiers of the Bank*, of the pay-

1766.

GIBSON'S CASE.

" ment of the money into the Bank." THE SECOND COUNT was for publishing the same, knowing them to be forged, &c. THE THIRD and FOURTH COUNTS were, the one for forging, the other for publishing " a writing in form of a writing pur- " porting to be *an office-copy of the certificate of the Ac-* " *countant-General*," and " *an office-copy of the receipt of the* " *Cashier of the Bank*," which *certificate* and *receipt* were set out in all the Counts as follows:

" *20th of Feb.* 1764.

" BETWEEN *Robert Lee, Esq.* and *Christopher D'Oyley,* " *Esq.* executors of *Sir George Browne, Baronet,* plaintiffs, " AND *Robert Pringle, Esq.* and others, defendants.

" BY original and supplemental bills, and bills of reviver.

" I DO hereby certify, that pursuant to an order dated the " thirteenth of February instant, Mr. *William Hunt,* the " Receiver, hath paid into the Bank of England the sum of " four hundred and thirty-seven pounds thirteen shillings and " seven pence, which is placed to my account as Accountant- " General, and to the credit of the cause of *Browne against* " *Pringle,* in Master *Bennet's* office; as appears by the re- " ceipt of Mr. *B. Sabbarton,* one of the Cashiers of the " Bank, DATED the sixteenth instant, hereto annexed.

" T. ANGUISH,

" *Accountant-General.*"

" LONDON, *the 16th of Feb.* 1764.

" RECEIVED of Mr. *William Hunt,* the Receiver, the sum " of 437*l.* 13*s.* 7*d.* pursuant to an order dated 13 Feb. in- " stant, made in the cause of *Lee against Pringle,* which " money is placed to the account of *Thomas Anguish,* Esq. " as Accountant-General of the Court of Chancery, and to " the credit of the cause of *Browne against Pringle,* in Mas- " ter *Bennet's* Office, in the books kept at the Bank for the " Suitors of the said Court of Chancery.

" For the Governor and Co. of the Bank of England, " 437*l.* 13*s.* 7*d.* entered."

" *T. Gradwell,* examined." " *B. Sabbarton.*"

1766.

GIBSON'S CASE.

AND the offence was laid with intent to defraud the said *William Hunt* of the sum of 437*l.* 13*s.* 7*d.* against the form of the statute.

THE Jury found a special verdict comprizing the facts above stated (*a*), and on the 26th November, 1767, following it was argued by Counsel (*b*) before LORD MANSFIELD and nine other of the Judges in the Exchequer Chamber. After the argument LORD MANSFIELD observed, that the verdict left but one question to consider, namely, whether the offence was within the statute 12 Geo. I. c. 32. s. 9; and said that if they had any doubts, the Judges would appoint it to be argued again the next term; and therefore their Lordships deferred giving their opinion. But in Hilary Term 1768, eleven Judges met at Serjeants'-Inn, and they were of opinion that *the indictment* and *the special verdict* were sufficient and needed no amendment; and that *the case* was within the statute.

THE prisoner was executed on Wednesday 23d March, 1768.

(*a*) See this special verdict stated at large, 2 East, Pleas Cro. 899.
(*b*) See the arguments of Counsel, 2 East, Pleas Cro. 901.

1767.

CASE XXXIV.

THE KING *against* JOSEPH ALEXANDER.

Qu. Whether a *false oath* taken in Doctors' Commons for the purpose of obtaining a *marriage licence* is *perjury?*

AT the Old Bailey in January Session 1767 *Joseph Alexander*, a Negro Servant belonging to the *Duke de Nivernois*, was indicted for wilful and corrupt perjury, in falsely swearing in Doctors' Commons, that *Charlotte*, the daughter of *Robert Nesbit*, Esq. of Marybone, was of the age of twenty-one years and upwards, whereas in truth and in fact she was only of the age of sixteen.

IT appeared in evidence, that the prisoner being left in England on the departure of the Duke his master, had procured recommendations to *Mr. Nesbit*, and was admitted into his house in the character of a Preceptor, to teach his daugh-

1767. ALEXANDER'S CASE.

ter the French language, and other fashionable accomplishments, of which the prisoner was perfect master. Taking advantage of the opportunities which this employment afforded him, he obtained *Miss Nesbit*'s consent to marry him. In order to warrant a Clergyman to perform the service, he obtained *a licence* by means of the *false oath*, for which he was now indicted; and in consequence of which the parties were married.

THE Jury found the prisoner guilty; but the case was reserved for the opinion of the TWELVE JUDGES. The question was agitated several times; but the prisoner dying in *Newgate*, the result of their Lordships' deliberations was never publicly communicated (*a*).

(*a*) The same point also came before the Judges in the case of *Robert Woodman*, who was indicted at the Old Bailey in September Session 1768, before MR. BARON PERROTT, present MR. JUSTICE WILLES and the present LORD CHIEF BARON, RECORDER, for perjury in an affidavit in Doctors' Commons, in order to obtain a licence to marry one *Catherine Hill*, Spinster, to which he knew no lawful impediment; WHEREAS in truth and in fact he knew she was the wife of *Ezekiel Shepherd*. But the opinion of the Judges was not publicly communicated.

1768.

CASE XXXV.

THE COAL-HEAVERS' CASE.

Persons present aiding and assisting *in shooting at another*, are principals, and within the penalties of the BLACK ACT.
S. C. 1 East, 413.

AT the Old Bailey in July Session 1768, the seven prisoners were tried before MR. JUSTICE GOULD, present LORD CHIEF BARON PARKER, and MR. JUSTICE ASTON, upon the BLACK ACT, 9 Geo. I. c. 22. on the following indictment:

" THE Jurors for our LORD the KING, upon their oath, " present, that *John Granger*, late of the parish of *St. Paul*, " *Shadwell*, in the county of *Middlesex*, Labourer; *Daniel* " *Clark*, late of the same, Labourer; otherwise called *Da-* " *niel Clane*, late of the same, Labourer; *Richard Cornwall*, " late of the same, Labourer; *Patrick Lynch*, late of the " same, Labourer; *Thomas Murray*, late of the same, La- " bourer; *Peter Flaharty*, late of the same, Labourer; and

1768.

THE COAL-HEAVERS' CASE.

" *Nicholas M'Cabe*, late of the same, Labourer; being ill-designing and disorderly persons, and of wicked and malicious dispositions, after the first day of June, 1723, *to wit*, on the 21st day of April, in the eighth year of the reign of our Sovereign Lord George the Third, by the Grace of God, &c. with force and arms, at the parish aforesaid, in the county aforesaid, with certain guns, charged with gunpowder and leaden bullets, *feloniously did wilfully and maliciously* (*a*) shoot at one *John Green*, (he the said *John Green*, then being in the dwelling-house of him the said *John Green*, situate in the said parish of *St. Paul, Shadwell*, in the said county of *Middlesex*) against the peace of our said LORD the KING, his Crown and Dignity; and also against the form of the statute, in such case made and provided."

THE evidence disclosed a scene of warfare quite unexampled, except in times of general commotion. An Act of Parliament had then lately passed for regulating the wages of *Coal-Heavers*, and a person of the name of *Green* was appointed deputy-agent for carrying the provisions of the statute into execution. An opposition, however, being made by a Justice of the Peace in the neighbourhood of Shadwell, Mr. *Green* became obnoxious to the *Coal-Heavers*, and they in great numbers tumultuously attacked his house in *Gravel-lane*, with every species of offensive weapon they could collect. Four of the prisoners were proved to have fired at Mr. *Green* through the windows of his house; and the marks of a great number of balls were afterwards found in different parts of the room. The other three prisoners were proved to have been *present* when the others fired, but they were not seen to use any fire-arms themselves.

THE Jury found all the prisoners guilty; but a question

(*a*) The modern indictments upon this statute are, " *unlawfully, wilfully, maliciously, and feloniously* did shoot, &c." The offence must be charged to have been done wilfully and maliciously as well as feloniously: and therefore in Davis's Case where the word *wilfully* was omitted, the indictment was held to be bad. See *post*, Rex *v.* Davis, Hertford Summer Assizes 1788.

1768.

THE COAL-HEAVERS' CASE.

was reserved for the opinion of the Judges, Whether those who were only present aiding and abetting, were involved in the same guilt with those who had actually fired; the statute upon which the indictment was framed being silent as to aiders and abettors?

19 Hen. VI. 47. Staun. 44. 3 Inst. 45. 1 Hale, 613. 2 Hawk. 444. Foster, 354.

THE Judges determined, That this offence was a *new-created felony*; and therefore, that it must necessarily possess all the incidents which appertain to felony by the rules and principles of the common law (1). The statute does not merely take away the privilege of clergy from an offence which was before known, but it ordains that those who are *guilty* of the thing prohibited by it, shall be adjudged felons without benefit of clergy; and therefore, by a necessary implication, makes all the procurers and abettors of it principals or accessaries, upon the same circumstances which will make them such in a felony by the common law; and it hath been long settled, that all those who are present aiding and abetting when a felony is committed, are principals in the second degree (*a*).

(1) See the case of *Taylor* and *Shaw*, *post*, Lent Assize, Sussex, 1785.

(*a*) At the Lent Assizes for the county of *Gloucester*, 1749, *John Midwinter* and *Richard Sims* were tried before MR. JUSTICE FOSTER, on an indictment grounded on the statute 9 Geo. I. c. 22. for unlawfully, maliciously, and feloniously killing a mare, the property of *James Lenox Dutton, Esq.*—*Midwinter* was found guilty and received sentence of death; but the Judge doubting whether *Sims*, upon the evidence given against him, could be brought within the penalty of the statute, *so as to be ousted of clergy*, the Jury, by his direction, found the matter special with regard to him; and they found in substance, That on the 16th November then last, *Midwinter* and *Sims*, with one *Taylor*, who was admitted an evidence for the KING, having conceived a prejudice against the prosecutor, on account of a prosecution which he was then carrying on against them for stealing rabbits, agreed to take their revenge on him, and to kill one of his breeding mares that night; that with that intent they all went, about midnight, to a close of the prosecutor, called *The Home Park*, where his breeding mares were kept; that *Midwinter*, with the assistance of the other two, caught one of the mares, and buckled his own girdle about her neck, fastening a girdle of *Sims's* to his own; and that *Sims* took hold of the girdle, fixed in this manner, to the mare's neck, and held it straight, in order to prevent the mare getting away, or starting from the blow, while *Midwinter*, with a large sharp hook, called *a bill*, gave the mare a deep wound in the belly, near the udder, of which wound she died that

THE seven prisoners were accordingly executed, on Tuesday 26th July 1768, near the Sun-Tavern Fields, Shadwell. 1768.

THE COAL-HEAVERS' CASE.

night. The Judge's doubt was, whether, as *Sims* did not give the stroke, his being present and aiding in the manner stated above, would bring him within the penalty of this law *so as to oust him of clergy;* since the Act doth not by any express provision take in aiding and abetting. The Judges had one meeting in the summer following, at Lord Chief Justice *Lee*'s chambers, to consider this case; and it was then spoken to, but very shortly, by Lord Chief Baron *Parker*, Mr. Justice *Bennet*, and Mr. Justice *Foster*. The two former were fully of opinion that the prisoner was ousted of his clergy; the latter was of a contrary opinion. Mr. Justice *Wright* and Mr. Justice *Dennison*, at that meeting, inclined to the latter opinion: but neither of the Chief Justices, nor any of the Judges except those before mentioned, did then declare any opinion; and the case was adjourned for further consideration. But, afterwards, Mr. Justice *Wright* and Mr. Justice *Dennison* concurred with the Lord Chief Baron, and Mr. Justice *Bennet;* and the other Judges, except Mr. Justice *Foster*, concurring in the same opinion, Judgment of Death was pronounced on the prisoner. See this Case, cited by Lord *Mansfield* in the Case of *Rex* v. *John Royce*, 4 Burr. Rep. 2075; and Mr. Justice *Foster*'s reasons for his opinion upon this subject, Foster's Cro. Law. 3d. edit. page 416.

THE CASE OF DOYLE AND VALLINE.

CASE XXXV*.

AT the Old Bailey in October Session 1769, *John Doyle* and *John Valline* were tried before JAMES EYRE, ESQ. Recorder of the City of *London*, for a felony without benefit of Clergy; and, the Jury finding them guilty of the offence charged in the indictment, the Recorder passed sentence upon them in the usual form, *viz.* "That you the several prisoners "at the Bar, be taken hence to the place from whence you "came, and from thence to *the usual place* of execution, "where you are to be severally hanged by the neck until you "are dead; and may God Almighty be merciful to your "souls."

The time and place of execution of a convicted felon is no part of the sentence.

THE KING afterwards signified his pleasure to THE RECORDER by his *sign manual*, that he should by his *warrant* direct *John Doyle* and *John Valline* to be executed in the

1769.

DOYLE AND VALLINE'S CASE.

most convenient place near *Bethnal Green Church* in the county of *Middlesex*; and the Recorder accordingly, on the 9th November 1769, issued his warrant directed "to the "Sheriff of the City of *London*, and to the Sheriffs of the "county of *Middlesex*, and to the Keeper of his Majesty's "Gaol of *Newgate*," reciting the above circumstances, and ordering "that the execution of the said sentence be made "and done upon them the said *John Doyle* and *John Valline*, "on Wednesday the fifteenth day of this instant month of "November, at the most convenient place near *Bethnal* "*Green Church* in the said County of *Middlesex*."

BUT THE SHERIFFS entertaining a doubt whether it was lawful for them to execute the said convicts, according to the tenor of the warrant, an application was made to LORD CAMDEN, Lord High Chancellor; and by his interference the question "whether it was lawful for the Sheriffs to execute the said "convicts, according to the tenor of the warrant, at the "most convenient place near *Bethnal Green Church* in the "county of *Middlesex*," was referred to the consideration of THE TWELVE JUDGES.

THE TWELVE JUDGES, on the 24th November 1769, certified to THE LORD CHANCELLOR, that they had taken this question into consideration, and were all of opinion that the time and place of execution are in law no part of the Judgment, and that THE RECORDER'S warrant was a lawful authority to the Sheriffs, as to the time and place of executing the two convicts.

1770.

CASE XXXVI.

THE KING *against* DICK.

Forging *a Scotch bank-note* is not within the English statutes against forgery. S. C. 2 East, 925.

THE prisoner was convicted at *Newcastle upon Tyne*, in the year 1770, of knowingly uttering a forged and counterfeited writing obligatory, commonly called a *Scotch bank-note* (*a*), with intention to defraud *John Ormston* and *Joseph Lamb*. The note was in the following form:

(*a*) *Vide* 5 Geo. III. c. 49. for preventing the inconveniencies arising from the circulation of Scotch Bank-notes.

1770.

DICK'S CASE.

"FIVE POUNDS. BOND ACCORD. STERLING.
"No. $\frac{157}{28}$.

"*Aberdeen*, 1 *May*, 1767.

"THE Banking Company in Aberdeen are hereby obliged "to pay to *James Brand*, or bearer, on demand, at their "Office HERE, Five Pounds Sterling, by order of the di- "rectors.

"R. SUNDERLAND,
"*Cashier*."

"W. Brebner, } *Directors*."
"J. Burnett, }

IT appeared in evidence, that the Company was an association of most of the gentlemen of that county; and that they issued notes under the signature of a Cashier and two Directors, in the form above-mentioned.

IT was submitted to THE TWELVE JUDGES, Whether this note is within the meaning of the statute of 2 Geo. II. c. 25.? which makes the forging or uttering of any writing obligatory a capital offence, and if so, Whether the uttering it in *England* is felony?

THE JUDGES were divided in their opinions upon both these questions; the 2 Geo. II. c. 25. s. 4. expressly providing "that nothing in this Act contained shall extend or be "construed to extend to that part of Great Britain called "*Scotland*," and the note being made payable *locally* where it was drawn.

The prisoner lay in gaol for some time, and at length received the King's pardon.

THE KING *against* DONNAVAN.

CASE XXXVII.

A *prison* or *common gaol* is a *house* within the meaning of 9 Geo. I. c. 22. S. C. 2 East, 1020.

AT Serjeants-Inn Hall, on the first day of *Easter Term* 1770, MR. JUSTICE GOULD submitted the following Case to the consideration of the Judges, who were all present except MR. BARON ADAMS.

1770.

DONNAVAN'S CASE.

S. C. 2 Black. Rep. 682.

AT the last Lent Assizes for Lancaster, *James Donnavan* was tried, and found guilty of the crime of Arson.—The *first count* in the indictment charged him with maliciously setting on fire, about the hour of eleven at night, "a house of the "Mayor, Bailiffs, and Burgesses of the town of *Liverpool*, "called THE COMMON GAOL."—The *second count* described it to be "A HOUSE of the Mayor and Bailiffs, (by names) "called the Common Gaol."—The *third count* described it to be "the house of *Hannah Kerby*."—A *fourth count* described it to be "the house of *Richard Rigby*." But it was not added in either of the three last counts, "called a Com-"mon Gaol."

THE prisoner was confined for debt; and on the 28th January 1770, he voluntarily set fire to his box, which was a little apartment in the prison; and the whole gaol would unavoidably have been burned down, if timely assistance had not extinguished the flames. The gaol belonged to the Corporation of *Liverpool*; and was always used as the place of confinement both for criminals and debtors. *Richard Rigby*, one of the Serjeants of the town, was the keeper of this gaol; adjoining to which a dwelling-house was built for him to live in, and wherein he permitted his mother-in-law, *Hannah Kerby*, to dwell, who kept it as a public-house. A wall separated the prison from his house; and the entrance into the prison was from the dwelling-house, by a door through the wall, which door was locked every night. Nobody inhabited the prison itself but the prisoners. Any prisoner who was able to pay for a bed was supplied with one by Mrs. *Kerby*, either in the gaol or in the house; and the rate of payment was the same, whether it was in the one place or the other.

THE statute of 9 Geo. I. c. 22. enacts, "That if any per-"son or persons shall set fire to any house, barn, or out-"house, or to any hovel, cock, mow, or stack of corn, straw, "hay, or wood, &c. they shall suffer death without benefit "of clergy." And the question was, Whether this PRISON was to be considered as a HOUSE within the meaning of the legislature?

THE Judges concurred with MR. JUSTICE GOULD, that this case was fully within the meaning of the Act; the dwelling-house being to be considered as part of the prison, and the prison as the house of the Corporation. 1770.

DONNAVAN'S CASE.

THE KING *against* COX. CASE XXXVIII.

JOHN COX was tried and convicted at the *Old Bailey* upon an indictment of perjury at Common Law, for that he, intending to hold one *Jonathan Chubb* to bail, on 23d May 1770, *falsely*, *maliciously*, *wickedly*, and *corruptly*, swore that the said *Jonathan Chubb* was justly and truly indebted to him in the sum of 1300*l.* and upwards, for a moiety or half part of a ship called *The Hibernia*, and her tackle, apparel, furniture, &c.

The word "*wilful*" is not necessary in an indictment of perjury at common law.

IT was objected by the prisoner's Counsel, in arrest of judgment, that the indictment was bad, in not having stated that the offence had been committed *wilfully*; and the case was reserved for the opinion of the Judges.

See Rex v. Davies, at Hereford Assizes 1788, *post*.

TEN Judges, Ld. C. J. DE GREY *absent*, were unanimously of opinion, That in an indictment for perjury on the 5 Eliz. c. 9. the word *wilfully* is essential, and must be inserted; because the term "*wilful*," in the statute, is a material description of the offence; but that it is not necessary in the present case; for the indictment being at Common Law, and not on the statute, the words *falsely*, *maliciously*, *wickedly*, and *corruptly*, imply that the offence was committed *wilfully*. And the following authorities were cited, *Hetl.* 12. *Cro. Eliz.* 147. 201. 2 *Hale*, 169. 172. 184. 187. *Shower*, 190. 3 *Inst.* 167, 2 *Hawk.* 6*th edit.* 258. 326.

Ld. Mansfield,
L. C. B. Smythe,
J. Gould,
J. Willes,
J. Blackstone,
J. Ashhurst,
J. Nares,
B. Eyre,
B. Adams,
B. Perrot.

1770.

CASE XXXIX. THE KING *against* JOHN PATY.

The 9 Geo. I. c. 22. was designed to extend the offences described in 22 & 23 Car. II. c. 7. and therefore *horses*, *mares*, and *colts*, are included in the word *cattle*.

S. C. 2 Black. Rep. 721.

S. C. 2 East, 1074.

AT Abingdon Summer Assizes 1770, *John Paty* was tried and convicted on the 9 Geo. I. c. 22. before MR. JUSTICE BLACKSTONE, for feloniously, unlawfully, knowingly, wilfully and maliciously shooting at and killing *one mare*, of a mixed red and white colour, and one brown *stone colt*, the property of *Matthew Batten*.

THE words of the statute are, "That if any person shall "unlawfully and maliciously kill, maim, or wound any *cattle*, "he shall suffer death without benefit of clergy."

IT was moved in arrest of judgment, that the indictment ought to have averred, that the *mare* and *colt* were *cattle* within the meaning of the Act, for that the word *cattle* does not necessarily include *horses*, *mares*, and *colts*. To support these objections, it was argued, That the legislature in the statutes of 3 & 4 Edw. VI. c. 19. 5 & 6 Edw. VI. c. 14. and 31 Geo. II. c. 40. for regulating the sale of cattle, has thought it necessary to mention by *name* the several species of beasts to which the provisions of these Acts were designed to extend; that the 12 Car. II. c. 4. respecting rates distinguishes between the subsidy to be paid on *great cattle* imported, *viz.* 50*s.* and that which is to be paid on *horses* and *mares*, *viz.* 10*l.*; that 22 Car. II. c. 13. distinguishes between the encouragements given for breeding *cattle of all sorts*, and for breeding *horses*; and that when 14 Geo. II. c. 6. made it felony without clergy to steal sheep or other *cattle*, it was found necessary to specify by 15 Geo. II. c. 34. what cattle were intended by the Act, among which neither horses, mares, or colts are included.

ON the first day of Michaelmas Term 1770, this case was submitted to the Judges at Serjeants-Inn; and they unanimously agreed, That as the statute of 22 & 23 Car. II. c. 7. had made the offence of killing horses *by night* a single felony, this statute of 9 Geo. I. c. 22. was to be considered as an extension of that Act; and some precedents of capital *convic-*

tions were cited upon this branch of the statute, but none of *executions*. 1770.

PATY'S CASE.

IT was agreed that judgment of death should be given against the prisoner at the next assizes; but he was then reprieved for transportation; and afterwards, upon strong application from the country, received a free pardon (*a*).

(*a*) See the case of *Robert Mott*, Old Bailey September Session, 1783, convicted for wounding a gelding, where an objection in arrest of judgment was over-ruled by Mr. Baron *Hotham* upon the authority of this case.

1771.

CASE XL.

THE KING *against* RICHARD MORTIS.

A BILL of indictment having been found at *Hicks's Hall*, by the Grand Jury for *the County of Middlesex*, against *Richard Mortis*, for maliciously shooting at one *Thomas Parkinson* in the *County of Hertford*, the prisoner was arraigned upon this indictment at the *Old Bailey* January Session 1771; but LORD CHIEF BARON PARKER and MR. JUSTICE GOULD, who were then in the Commission of General Gaol Delivery of *Newgate*, doubted, whether the words of The BLACK ACT authorized a private prosecutor to prosecute for this offence in any county at his option; or whether a special commission ought not to be granted by the King for this purpose.

A private prosecutor on 9 Geo. I. c. 22. has an option to prefer his indictment in such county as he thinks most favourable to the ends of justice. S. C. 2 Black. Rep. 733.

UPON this doubt the prisoner was remanded, and the question submitted to the consideration of the Judges at Serjeants-Inn Hall on the first day of the then next ensuing Hilary Term; and it was generally agreed, that the words of 9 Geo. I. c. 22. s. 14. extend to give a prosecutor the option of preferring his indictment in such county in *England* as may appear to him to be most conducive to the ends of justice; but that he cannot exercise this right for the purposes of injustice and oppression; for the words are, "And for the *better and* "*more impartial trial* of any indictment or information "which shall be found, commenced, or prosecuted, for any

Determined by all the Judges, Hilary Term, 10 Geo. 3.—See this Case cited 4 Bl. Com. 304.

1771.

MORTIS'S CASE.
4 Term Rep. 490.

" of the offences committed against this Act; BE IT ENACTED, That every offence that shall be done or committed " contrary to this Act, shall and may be enquired of, examined, tried, and determined, in any county within that " part of *Great Britain* called *England*, in such manner " and form as if the fact had been therein committed."

THE prisoner was accordingly tried and convicted at the Old Bailey, before MR. JUSTICE ASHHURST in the February Session following, and was afterwards executed pursuant to his sentence.

CASE XLI.

THE KING *against* MAXIMILIAN MILLER.

The King's *sign manual* may be given in evidence on an indictment for returning from transportation; and if the condition of it has been literally complied with, the prisoner shall be remitted to his former sentence.

S. C. 2 Black. Rep. 797.

MAXIMILIAN MILLER was convicted of grand larceny at the Old Bailey in January Session 1771, and received judgment of transportation to *America* for the term of seven years. On the 22d April following he obtained the SIGN MANUAL, signifying to the Recorder and Sheriffs of London his Majesty's intention to pardon the said crime, " upon condition of his giving security, to the satisfaction of the Recorder, to leave the kingdom within the space of fourteen " days from the date thereof, and not to return again for " the space of seven years:" AND ORDERING, " That the " said *Maximilian Miller* be, upon his giving such security " as aforesaid, immediately discharged out of custody; and " that he be inserted for his crime above-mentioned in the " first and next general pardon that shall come out for the " poor convicts in Newgate."

ON the 23d April this SIGN MANUAL was delivered to the Recorder, and the same day two sureties entered into a recognizance of 100*l.* each, to be void, " if *Maximilian Miller*, then a prisoner in Newgate, did, within the space of " fourteen days from 22d April, transport himself out of " the kingdom of *Great Britain*, &c. and did not return, " nor was found at large in the kingdom of *Great Britain* " within the term of seven years next ensuing."

1771.

MILLER'S CASE.

UPON this recognizance being completed, the Recorder made his warrant to the Keeper of Newgate, by virtue whereof the prisoner was discharged out of custody; but on the 26th November following he was apprehended in *Piccadilly*, and indicted for a capital offence at the ensuing December Session at the Old Bailey, for being found at large in Great Britain, *without any lawful cause*, before the expiration of his term.

THE record of his conviction was produced, his person was identified, his being at large was proved, and he offered to give in evidence the SIGN MANUAL, with its attendant circumstances, as above stated, in his defence; but the Court thought it was not admissible. Upon which the Jury were directed to find the prisoner *Guilty*, subject to the opinion of THE TWELVE JUDGES upon the following questions:

First, WHETHER the SIGN MANUAL ought to have been received in evidence?

Secondly, WHETHER, if it had been received, the prisoner could have availed himself of it, as he had not *substantially* performed the condition of his intended pardon?

No solemn adjudication has ever been publicly communicated upon this case; but it is reported (1), that all the Judges, except L. C. J. DE GREY, met at LORD MANSFIELD'S Chambers on the first day of Hilary Term 1772, and that they were unanimously of the following opinion:

(1) 2 Black. Rep. 797.

First, THAT the SIGN MANUAL ought to have been received in evidence; for although it was only significant of the King's *intention* to pardon, and therefore might be revoked, yet as it was an authority for the Judge to admit the prisoner to bail, it was evidence of a lawful cause for his appearing at large.

Secondly, THAT the SIGN MANUAL was improperly worded, by the mistake of the officer; for it should have been, "upon condition of the said *Maximilian Miller* transporting himself, &c. and of his giving security to the satisfaction of the *Recorder*;" and not merely upon condition

1771. MILLER'S CASE.

of his giving security, &c. (*a*). That the King might revoke his intended grace on account of this apparent fraud; but as he had not in fact revoked it, and as the prisoner had *literally* complied with the condition, he ought not to have been convicted upon this indictment.

THE prisoner was referred to his original sentence of transportation, as not having performed the condition upon which his pardon was to be granted; that is, he was pardoned on condition of transporting himself within fourteen days.

(*a*) In the case of *Hotham* v. *the East India Company*, *Hil. Term.* 27 Geo. III. it was said by the Court, That no precise technical words are required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend upon its being *prior* or *posterior* in the deed; but that it must depend on the nature of the contract, and the acts to be performed by the parties.—1 Term Rep. B. R. 645.

See also the same doctrine held by *Lord Talbot* in the case of *Robinson* v. *Comyns*, Forrester's Reports of Cases Temp. Talbot, 166.

CASE XLII.

THE KING *against* VARLEY.

Forging the impression of the current coin on a piece of metal so irregular that it will not pass, is not high treason; for the crime is incomplete.

WILLIAM VARLEY was found guilty at the Lent Assizes for *York*, in the year 1771, of forging and counterfeiting a forged and false coin to the *similitude* of half-a-guinea.

IT appeared in evidence, That he had counterfeited the impression of half-a-guinea on a piece of gold which was previously hammered, and was not round, nor would pass in the condition it then was. This, with many others, he delivered to one *James Green*, who carried them away, and what became of them afterwards could not be proved.

S. C. 2 Black. Rep. 682. See 1 East, 164.

MR. JUSTICE GOULD, who tried the prisoner, doubting whether this was high treason, respited the judgment, and laid the case before all the Judges; who (*absente* BARON

ADAMS) were unanimously of opinion, That the crime was incomplete, and that the prisoner should be recommended to his Majesty for a pardon.

See Wooldridge's Case, *post.*

1771.

THE KING *against* ROBERT POWELL. CASE XLIII.

ROBERT POWELL had personated one *Taylor Barrow* in the sale of 400*l.* East-India Stock to a Mr. *Joseph Sykes*, and had signed the usual receipt upon the transfer with the name T. BARROW. *Powell* was convicted of this forgery at the Old Bailey in May Session 1771, before MR. JUSTICE ASTON. The indictment simply charged, That he, on such a day, "feloniously did falsely make, forge, and counterfeit, &c. a certain receipt for money *as follows, that is to say;*" and then set out a *fac-simile* of the receipt. There were also in the same form, the usual counts for uttering the receipt, knowing it to be forged; and charging the offence to have been committed with an intention to defraud, 1st. *Joseph Sykes*, 2dly. *Taylor Barrow*, and 3dly. The *East-India Company.*

"As follows" is a sufficient averment of *the tenor* of an instrument; and in forgery averring a general intent to defraud is sufficient, without setting out the particular mode by which the fraud was intended to be effected.

S. C. 2 Black. Rep. 787.

UPON the last day of the Session, the prisoner's Counsel moved in arrest of judgment before JAMES EYRE, Esq. Recorder,

S. C. 2 East, ch. 19. s. 53.

First, THAT it does not appear upon the face of the indictment, that the *tenor* of the receipt is set out, for the words, "*as follows, that is to say,*" do not import the *tenor*, or sufficiently shew that the receipt is set out in the *words*, *figures*, and *letters* of it: the indictment should have been, "*according to the tenor following.*"

Secondly, THE possibility of a fraud or injury being committed by means of the receipt depends upon the manner in which it was to operate; and therefore *the mode* of its operation being a material fact, ought to have been distinctly averred in the indictment. For instance, unless Mr. *Barrow* had possessed the stock, the prisoner could not have sold it,

1771. and his receipt upon the transfer would have been vain and inoperative. The indictment therefore should have alleged, That *Taylor Barrow* was a proprietor of so much stock; that it had been sold at such a price, and transferred to such a person; but above all, it ought to have averred, that the name T. BARROW, which was put to the receipt, *purported* to be the receipt, or was intended to pass as the receipt of *Taylor Barrow*; for the Court cannot collect any of these facts from the indictment in its present form. The instrument is set forth under the signature of T. BARROW only; and it cannot be collected or intended to be the receipt of *Taylor Barrow* more than of *Thomas Barrow*, or of any other *Barrow* whose Christian name begins with a T.

POWELL'S CASE.

To afford the prisoner every possibility of advantage from these objections, the judgment was respited, and the case submitted to the consideration of the Judges on the first day of the ensuing Michaelmas Term, at LORD MANSFIELD'S Chambers. All the Judges, except L. C. J. DE GREY, were present; and upon the *first* objection they were unanimous, "That a certain receipt for money *as follows, that is to* "*say*," is altogether as certain as if it had been said, "*ac-* "*cording to the tenor following*," or, "*in the words and* "*figures following, that is to say:*" and that if the prosecutor had failed in evidence in proving the receipt *verbatim* as laid, it would have been a fatal variance. As to the *second* objection, some of the Judges doubted; but a great majority were of opinion, That in an indictment for forgery, it is sufficient to aver *a general intent to defraud a certain person*, which intention may be made out by the facts in evidence at the trial.

See S. C. 2 East, 989.

THIS case was afterwards more solemnly argued before all the Judges, except BLACKSTONE, at Serjeants-Inn Hall, on 30th November 1771; and they adhered to their former determination.

THE prisoner was executed.

1771.

THE KING *against* BIRCH AND MARTIN.

CASE XLIV.

EDWARD BIRCH and *Matthew Martin* were convicted at the Old Bailey in September Session 1771, before JAMES EYRE, Esq. Recorder, for publishing as a true will, a certain false, forged, and counterfeited paper-writing, *purporting* to be "the last will and testament of *Sir Andrew Chad-*"*wick* deceased, knowing it to be forged;" the tenor of which was set out in the indictment.

Indictment for forging a paper-writing *purporting* to be A WILL, is good.

S. C. 2 Black. Rep. 790.

IT was moved in arrest of judgment, that the indictment should have charged the prisoners with having forged and published "a certain will and testament," &c. and not "a "paper-writing purporting to be the last will:" for the statute says, "shall forge *a will*, &c."

S. C. 2 East, 980.

IN Michaelmas Term 1771, the question was argued before all the Judges at Serjeants-Inn Hall; and they unanimously agreed, That the indictment was perfectly right, and over-ruled the exception, on a variety of precedents being produced, in which it was laid in the same manner: and they thought that it would be good either way.

THE prisoners were executed at *Tyburn*, on Thursday, January 2, 1772.

THE KING *against* SHAW.

CASE XLV.

AT the Old Bailey in September Session 1771, *Samuel Shaw* was tried before JAMES EYRE, Esq. Recorder, on the statutes 5 Geo. III. c. 25. s. 17. and 7 Geo. III. c. 50. which enact, "That if any deputy, clerk, agent, letter-carrier, post-boy, "or rider; or any other officer or person whatsoever em-"ployed in receiving, stamping, sorting, charging, carry-

A prisoner acquitted on a charge of felony committed, as a *sorter and charger* of letters, cannot be convicted on another count, charging him generally as a *person employed in the Post-Office*, if in fact he is only employed as a *sorter* of letters.—S. C. 2 East, 980.

1771. SHAW'S CASE.

" ing, conveying, or delivering letters or packets, or in any " other business relating to the Post-Office, shall secrete, " embezzle, or destroy any letter, or packet, or bag of let- " ters, which he shall be entrusted with, or which shall have " come to his possession, containing any bank-note, bank " post bill, bill of exchange, exchequer bill, South Sea or " East India Bond, &c. &c. or shall steal or take the same " out of any letter or packet that shall come to his posses- " sion, he shall suffer death without the benefit of clergy."

THE indictment consisted of four counts.—

S. C. 2 Black. Rep. 789.

THE *first* and *third* counts charged him as " *a Clerk em-* " *ployed in* SORTING *and* CHARGING *letters in the Post-Office,*" *viz.* 1st. With having secreted, embezzled, and destroyed a certain letter containing a bank-note of twenty pounds: 2dly. With having stolen the bank-note out of the letter.

THE *second* and *fourth* counts respectively charged him with the same offences, " *as being a person employed in the* " *business relating to the General Post-Office.*"

THE facts of embezzling the letter and stealing the bank-note were very clearly proved; but as it appeared that he was not employed in *sorting* and *charging* letters, but in *sorting* them only, the Jury, by the direction of the Court, found him *guilty* on the *second* and *fourth* counts; and acquitted him on the *first* and *third.*

UPON this finding it was moved in arrest of judgment, That as the Jury had acquitted him on the counts which charged him as *a sorter* and *charger*, and he had not been proved to be a person employed by the Post-Office in any other business than that of *a sorter*, his conviction could not be supported on the *second* and *fourth* counts of the indictment.

DURING the course of Michaelmas Term 1771, this case was adjourned to Serjeants-Inn Hall, and argued before eleven of the Judges (absent BLACKSTONE); and they unanimously agreed, That the judgment must be arrested for the causes above alleged: but they were inclined to think the Jury might have convicted the prisoner on the *first* and

third counts, by a special finding that he was *a sorter* only.

See 42 Geo. III. c. 81. and 52 Geo. III. c. 143.

THE prisoner died in Newgate in the month of January 1772.

1772.

THE KING *against* SLOPER.

CASE XLVI.

A person employed by the Post-Office as a stamper or facer of letters, who embezzles letters for the purpose of defrauding the Post-Office of *the postage*, is not within 7 Geo. III. c. 50. S. C. 2 East, 583.

AT the Old Bailey, in January Session 1772, *Joseph Sloper* was indicted on the statute 7 Geo. III. c. 50. before MR. JUSTICE BLACKSTONE, for that he being a person employed in the business relating to the Post-Office, TO WIT, in stamping of letters, feloniously did secrete a letter *(describing it)* containing a bank-note of ten pounds.

THERE were three other counts, which described him, FIRST, as an officer employed in the business of the Post-Office: SECONDLY, as a person employed in facing letters: THIRDLY, as a person employed in facing letters and packets. And there was a FIFTH COUNT, which charged him with having stolen the letter out of the Post-Office, without averring that it contained the bank-note.

IT appeared in evidence, that he was employed by the Post-Office in the several capacities of an established porter, stamper, facer, and letter-carrier; and that he was apprehended in the very act of secreting *a letter* (*a*), while he was acting as a *stamper*. This detection induced a further enquiry, and upon breaking open a drawer, of which he had a key as letter-carrier, no less than 124 paid letters were found in his custody, the postage of which had been received by him from the different receiving-houses, at the time he brought away the bags. From this parcel the letter mentioned in the indictment was selected. It was proved

(*a*) The prisoner was afterwards convicted of secreting this letter, containing *two half-guineas*; and the case upon this conviction was also referred to the Judges; but no determination was ever publicly communicated.

1772.

SLOPER'S CASE.

that it contained a ten pound bank-note; that 8*d.* had been paid for the postage of it at the receiving-house; that the receiver had put it into the paid bag with the rest of the paid letters; that he sealed the bag, and delivered it to the prisoner's deputy, who carried the bag with the seal unbroke to the Post-Office; and that after the Comptroller had broke the seal, the letters were turned out on a table, at which the prisoner was employed as a stamper and sorter; and it appeared that the prisoner must have got possession of it while he was facing the letters, and before it had reached the hands of the proper officer to stamp it as a letter "*post paid.*"

THE prisoner's Counsel submitted to the Court, that as it appeared he had not taken the bank-note, or indeed opened the letter, but that his intention was rather to defraud the Post-Office of the amount of the postage, than to steal or embezzle the letter or the note, his case was not within the meaning of the statutes on which the indictment was founded (1).

(1) See the words of the statutes, Rex *v.* Shaw, Old Bailey September Session, 1771, *ante*, p. 79.

THE Jury acquitted the prisoner on the fifth count, and found the following special verdict:

"THE prisoner *Joseph Sloper* was, on the 26th October "last, an Officer employed in the business relating to the "Post-Office, *to wit*, in *stamping* and *facing* letters which "are brought to the General Post-Office, &c. to be sent "from London by the Post; and being such Officer, did "on the 26th of October, &c. secrete a letter, subscribed "with the name *J. Price*, dated the 26th October 1771, "and directed to Mrs. *Kezia Price*, Hay, Breconshire; "which letter came to the hands and possession of the "said *Joseph Sloper*, being such Officer as aforesaid, and "which letter contained therein a bank-note in the words "and figures set forth in the indictment.—THAT the pri-"soner did secrete the said letter in the execution of his "office as a Stamper and Facer, without opening the same, "from the 26th October to the 16th December, and with-"out knowing that the bank-note above-mentioned was con-

See the Statute 5 Geo. III. c. 25. s. 19.

ained therein, but that he secreted it with intent to defraud the King of *the postage* thereof, which had been paid."

1772.

SLOPER'S CASE.

THE determination of the JUDGES upon this case was ver publicly communicated. The prisoner appears in the ndars of the Gaol of Newgate until July 1777, in which ion he remains for judgment; but in the following session, September 1777, there is no account of him (*a*).

a) At the Summer Assizes for Lancaster 1795, *James Howatt* was ined before MR. JUSTICE ROOKE, on the statute 7 Geo. III. c. 50. s. 2. *stealing* letters: 1st, out of the London Bag, 2dly, out of the Post-ce, 3dly, out of the receiving-house. It appeared that the prisoner, was a letter-carrier, had contrived to obtain possession of the letters re his parcel of letters were counted out to him by the clerks in the e, and he was detected with them in his pocket in the letter-carriers' n; but it appeared from circumstances, and the Jury found, that he nded to have delivered the letters and only to have embezzled *the age:* and on the case being saved, THE JUDGES all agreed that this not a stealing within 7 Geo. III. c. 50. By 5 Geo. III. c. 25. s. 19. made felony for any letter-carrier, &c. "to embezzle or apply to own use any money or monies by him received with letters or pack-for *the postage* thereof;" but this clause is omitted in the subsequent ute, 7 Geo. III. c. 50. made "to amend certain laws relating to the enue of the Post-Office, &c." But see now, 42 Geo. III. c. 81. and Geo. III. c. 143.

THE KING *against* JAMES BOLLAND.

CASE XLVII.

IT the Old Bailey in February Session 1772, *James Bold* was tried before JAMES EYRE, Esq. Recorder, present t. JUSTICE NARES, for forging on the back of a promissory e for the payment of money, drawn by one *Thomas Bradm*, and indorsed by one *Samuel Pritchard*, a certain insement in the name of *James Banks*, with intent to defraud *ncis-Lewis Cardeneaux*. The note was in the words and ures following.

It is felony to forge the name of a person, although such person never existed. S. C. 2 East, 958.

"£.100. LONDON, 12th *October*, 1771.

'TWO MONTHS after date, I promise to pay to Mr. *Sa-*

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" *muel Pritchard*, or order, One Hundred Pounds, value " received,

" T. BRADSHAW.

" *Charles-street, Covent-Garden.*"

THERE was also another count for uttering and publishing as true the said forged indorsement of the name of *James Banks*, knowing the same to be forged, with the like intention.

THE following circumstances appeared in evidence.

AN account of money transactions of a very complicated nature, and to a very large amount, subsisted between *Bolland* and one *Pritchard*. *Bolland* had arrested *Pritchard* for 2600*l.* and obtained a judgment for 1498*l.* 15*s.* A Mr. *Jesson* had discounted for *Bolland* a bill upon *Pritchard* of 52*l.* 10*s.* but neither *Pritchard* nor *Bolland* being able to take it up when it became due, it remained unpaid in the hands of *Jesson*. In the month of October 1771, *Bolland*, *Jesson*, and a Mr. *Lilburne*, met at the George and Vulture Tavern in Cornhill, in a public room. *Jesson* asked *Bolland* when he would settle the note of fifty guineas: *Bolland* immediately produced the note in question of 100*l.* drawn by *Bradshaw*, payable to *Pritchard*, and indorsed " JAMES BOLLAND," and asked *Jesson* to discount it. *Jesson*, upon observing that *Bolland* had indorsed it, told him, that as his name was on the back of it, he could not negotiate it; that he knew *Bradshaw*, and considered him as a good man; but that he did not chuse to put his (*Jesson's*) name on the same paper with *Bolland's*. *Bolland* replied, " I can take off my name." Immediately Mr. *Lilburne* took up one of the table-knives, with intention to erase all the name; but when he had erased all but the initial B, for he began at the last letter of the name, *Bolland* said, " Don't scratch it all out, for that may " disfigure or cancel it by scratching a hole in it; I will " think of some other name that begins with B;" and he immediately filled it up with " ANKS," which made the name BANKS. When this was done he returned the note to *Jesson*, who put it into his pocket, saying, " I shall give it to a par-

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"ticular friend of mine, and he will undoubtedly ask me "who BANKS is." To this *Bolland* replied, "BANKS is a "publican or victualler, and lives in or near Rathbone "Place (1).

THE ensuing day *Jesson* applied to Mr. *Cardeneaux*, to get this bill discounted. *Cardeneaux* took the bill, and promised to give *Jesson* the money for it on the Friday following. *Jesson*, having some money to make up, applied to *Cardeneaux* on the Thursday, and borrowed 15*l.* 16*s.* on the credit of the bill. On the Saturday morning *Bolland* applied to *Jesson*, and insisted on having the bill returned, or the amount of it paid to him. *Jesson* and *Bolland* went to a Coffee-house, and sent for *Cardeneaux*. He came, and *Jesson* introduced him to *Bolland* as the owner of the bill. *Cardeneaux* enquired of *Bolland* who *Pritchard* the payee and *Banks* the indorser of the bill were. *Bolland* said, "*Pritchard* is a man extremely well known; he is a dealer in "horses, and a man of great property. *Banks* also is a man "of property; he deals largely in wines and spirits, and "lives in Rathbone Place." *Cardeneaux* told *Bolland* that it was not convenient to him to give the whole in cash; upon which *Bolland* produced another bill of 10*l.* 10*s.* and *Cardeneaux* gave him his note for 50*l.* and a draft upon his banker for 44*l.* 5*s.* which with the 15*l.* 16*s.* he had paid before to *Jesson*, and 9*s.* discount, made up the 110*l.* 10*s.* for both the bills.

(1) See Gibson and Johnston *v.* Minet and Fector, 1st vol. Hen. Black. Rep. C. B. 588.

CARDENEAUX never desired *Bolland* to indorse the bills; because *Jesson* had told him when he gave him the 100*l.* bill, that it was better *his* name should not appear upon it, he having been formerly a Sheriff's Officer; and that the bill would not pass properly at the banker's with his name on it.

BEFORE the bill became due, both the drawer *Bradshaw* and the payee *Pritchard* became bankrupts. Upon these events *Cardeneaux* applied to *Jesson* for a direction to *Bolland*; and having got it, he said to *Bolland*, "That bill I "discounted for you will not be paid." *Bolland*, with an

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air of astonishment, said, "What bill! I never discounted "a bill with you, Sir. You mistake me. My name is *James* "*Bolland*. I never saw you in my life; and you have no "bill with my indorsement on it." And when *Cardeneaux* insinuated that he was acquainted with his having altered the name, he treated the idea of its being a forgery with the most supercilious contempt.

WHEN the bill became due *Bolland* refused to pay it; and *Cardeneaux* put it into the hands of a Mr. *Morris*, in order to obtain the money.

WHILE things remained in this situation, Mr. *Levi*, an Attorney, two of whose clients *Bolland* had deceived, got intelligence from *Pritchard* of the alteration of the name of "BOLLAND" to that of "BANKS," and he applied to *Cardeneaux* to prosecute, to which *Cardeneaux* consented. To obtain the note, *Levi*, by the desire of *Cardeneaux*, gave Mr. *Morris* an undertaking to deliver up, or to be accountable to him for, the bill. *Levi* apprehended *Bolland*, and, on his being committed by *Sir John Fielding*, deposited the note with Sir *John*'s clerk, who produced it at the trial.

AFTER *Bolland*'s commitment, a person brought the 100*l*. to Mr. *Cardeneaux*, in the name of *James Banks*, and he gave him a receipt, the form of which the person brought with him in the name of *James Banks*, containing a promise to deliver up the bill on demand, the bill being then in the custody of the Magistrate. But it did not appear that there ever was in fact such a person existing as JAMES BANKS *of Rathbone Place*.

THE Jury found the prisoner *Guilty*; and he received sentence of *Death*; but the execution of the sentence was respited; and it was submitted to the consideration of THE TWELVE JUDGES, Whether, under all the circumstances of this case, *Bolland* had been guilty of *forgery* within the meaning of the statute of the 2 Geo. II. c. 25.

THE opinion of the Judges upon this case was never publicly communicated. The principal doubt seems to have

See the Case of James Cogan, *post*. Old Bailey July Session, 1787.

been, Whether forgery can be committed in the name of a person who never had existence?

BOLLAND was executed at Tyburn the 18th May 1772.

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THE KING *against* CATHERINE GRAHAM. CASE XLVIII.

A *relative* referring with equal uncertainty to two *antecedents* will vitiate an indictment.

AT the Old Bailey in February Session 1772, three men, of the names of *Jennings*, *Birch*, and *Smith*, were tried as principals in simple grand larceny, before SIR JAMES EYRE, Recorder; present MR. BARON SMYTHE, MR. JUSTICE ASHHURST, and MR. JUSTICE NARES.

THE indictment contained two counts; the first of which charged the prisoners above named with stealing *two banknotes*; and the second charged them with stealing a *pocketbook* and other things, the property of *James Maden*, privately from his person.

IN the same indictment one *Catherine Graham* was charged as an accessary after the fact, at common law, for harbouring and maintaining the principal felons, "she well knowing that the said *Jennings*, *Birch*, and *Smith*, had committed *the felony aforesaid*." She also stood charged with receiving the said goods, well knowing them to have been stolen.

BIRCH was acquitted of the whole charge. *Jennings* and *Smith* were found guilty of stealing, but not privately from the person. *Catherine Graham* was found guilty of concealing and harbouring the principal felons.

SIR JAMES EYRE suggested a doubt as to the propriety of the conviction of the accessary. The indictment charged the principals with *two distinct felonies*; and the accessary with harbouring those principals, well knowing they had committed *the felony aforesaid*. It was therefore uncertain to which of the felonies this charge referred.

THE COURT concurring in this doubt, the judgment was respited, and the question submitted to the consideration of THE TWELVE JUDGES. In the June Session following, the

judgment was ordered to be arrested; and the prisoner *Catherine Graham* was discharged.

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CASE XLIX. THE KING *against* WITHAL AND OVEREND.

On an indictment of *burglary*, the prisoner may be acquitted of the *breaking*, and found guilty of *stealing* in the dwelling-house to the amount of forty shillings. S. C. 2 East, 515, 517.

AT the Assizes holden at *Guildford* for the County of *Surrey* 1772, the prisoners were tried upon an indictment for burglariously breaking and entering the dwelling-house of *Elizabeth Penifold* of *Croydon*, and stealing therein one box, containing sixty pounds of money, the property of the said *Elizabeth*. There was a second count, the same as the first, only laying it to be the property of thirty persons therein named, who held a Club at her house.

THE evidence was very full against the prisoners, as to the stealing of the box and money in the dwelling-house of *Elizabeth Penifold*, to whose care it was entrusted by the members of the Club; but as to the breaking, the evidence was defective.

See Hungerford's Case, 2 East, 518.

THE verdict was entered upon the record: "Jury say, NOT "GUILTY of breaking and entering the dwelling-house in "the night, but GUILTY of stealing the box and money in "the dwelling-house."

UPON this form of entering the verdict, it was objected by the prisoner's Counsel, that they were not excluded from the benefit of clergy, because the Jury had acquitted them of the burglary, and there was no separate and distinct count in the indictment on the 12 Ann. c. 7. for stealing in the dwelling-house to the value of forty shillings.

UPON this objection the case was reserved: but in Hilary Term 1774, THE JUDGES were of opinion, That the prisoners were by this finding ousted of their clergy, for that the indictment contained every charge that was necessary in an indictment upon that statute, viz. stealing in a dwelling-house to the amount of forty shillings.

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THE KING *against* ROGERS. CASE L.

AT the Old Bailey in October Session 1772, *William Rogers* was indicted before MR. JUSTICE GOULD, present MR. BARON ADAMS, for breaking and entering the dwelling-house of *Philip Chandler*.

The *apartments* of lodgers shall be considered as their respective *dwelling-houses*, if the owner of the premises do not sleep under the same roof. S. C. 2 East, 506.

THE owner of the house had let the whole of it in apartments to different persons; and did not inhabit any part himself. *Philip Chandler* rented the bottom part of the house, *viz.* a shop and a parlour, and a cellar which run underneath the shop and parlour, for 12*l.* 10*s. per annum*; but the owner had taken back the cellar for the purpose of keeping wood and lumber in it, and for which he gave *Chandler* ten shillings a year, which he deducted from the 12*l.* 10*s.* The entrance to the house was through a passage, by a door which opened into and from the street. In the passage another door opened into the parlour; and beyond that a staircase led to the upper apartments. The shop and parlour were broke open.

THE prisoner's Counsel objected, that this was improperly laid to be the dwelling-house of *Philip Chandler*.

ON the first day of the ensuing Michaelmas Term, MR. JUSTICE GOULD stated this case to nine of the Judges (1); and they all agreed that the shop and parlour were properly laid to be the dwelling-house of the prosecutor. They argued, that it could not be charged to be the dwelling-house of the owner, as he did not inhabit any part of it; and if under such circumstances it were not to be considered as the dwelling-house of the persons who rented the apartments, houses in these situations, which are extremely common in *London*, would be altogether unprotected against burglary. But if the owner had inhabited any part of the house, it would have been otherwise; for then the renters would have been lodgers or inmates, and it must have been charged to be the dwelling-house of the owner. See *Kelynge*, 83, 84.

(1) Ld. Mansfield, L. C. B. Smythe, Mr. J. Gould, Mr. J. Willes, Mr. J. Blackstone, Mr. J. Nares, Mr. B. Adams, Mr. B. Perrott, Mr. B. Eyre.

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ROGERS'S CASE.

Tracey, v. Talbot, 2 Salk. 532. General Gansel's Case, Cowper, 4. Turner's Case, O. B. February Sess. 1784. Trapshaw's Case, O. B. August 1786, post, and Carrol's Case post, O. B. February Sess. 1782 (a).

(*a*) I have been favoured with the following opinion of *L. C. J. Holt* upon this subject, from the manuscript notes of the late *L. C. B. Parker.*— If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally with their families, yet if they enter into the house at one outer door with the owner, these rooms cannot be said to be the *dwelling-houses* of the inmates, but the indictment ought to be for breaking the house of the owner. Mr. *Tanner*, an ancient Clerk of the Court, said, that the constant opinion and practice had been according to the opinion of *L. C. J. Kelynge*, which opinion was cited by *L. C. J. Holt*, upon this occasion at the Old Bailey October Session 1701. *See these notes referred to in the case of Lee and Gansel, Cowper's Reports, 2.*

CASE LI.

THE KING *against* HUGH LENNARD.

A prisoner may be indicted for having the unlawful custody of a *mould;* for a mould being mentioned in the first clause of the Act, it is to be considered as included in the general words *tool* or *instrument*, in the subsequent clause.

S. C. 1 East, 170.

S. C. 2 Black. Rep. 807.

AT the Lent Assizes for *Taunton*, in the county of *Somerset*, on 26th March, 1772, *Hugh Lennard* was indicted and tried before MR. JUSTICE BLACKSTONE on the statute of the 8 & 9 Will. III. c. 26. for High Treason, for having in his custody and possession, without any lawful authority or sufficient excuse, one *mould* made of lead, on which was *made and impressed* the figure, stamp, resemblance, and similitude of one of the sides or flats, *viz.* the head side, of a shilling.

THERE was another count for having in his custody *a mould* on which was made or impressed the figure, stamp, resemblance, and similitude of the *reverse side* of a shilling.

THE prisoner alledged in his defence that he was a button-maker, and that this was a mould for the casting of buttons, but produced no evidence; and the fact of custody being clearly proved, the Jury found the prisoner guilty; but MR. JUSTICE BLACKSTONE, there being no counsel for the pri-

soner, conceiving some doubts upon the case, respited the judgment in order to take the opinion of the TWELVE JUDGES.

THE statute on which the indictment was framed enacts, "That whoever (other than the persons employed in the "Mint) shall make or mend, or assist in making or mend- "ing, &c. any puncheon, counter-puncheon, matrix, stamp, "die, pattern or *mould*, of any materials whatsoever, in or "upon which there shall be, or be made or impressed, or "*which will make or impress* the figure, stamp, resemblance, "or similitude, of both or either of the sides or flats of any "gold or silver coin current within this kingdom." The Act then proceeds through a variety of other clauses, and concludes, "or shall have in their houses, custody, or pos- "session, any such puncheon, counter-puncheon, matrix, "stamp, die, (omitting the word *mould*), *or other tool or* "*instrument before-mentioned*, shall be adjudged guilty of "High Treason."

THE doubt of the learned Judge arose from the words pattern or *mould* being omitted in this latter clause of the Act, it being the particular clause upon which the indictment was framed. He therefore submitted the following points:

First, WHETHER the mould found in the custody of the prisoner is comprized under the general words *other tool or instrument before-mentioned*, so as to make the unlawful custody of it High Treason?

Secondly, IF it be so comprized, Whether it should not have been laid in the indictment to be a *tool or instrument* mentioned in the statute?

ON the first day of Easter Term all the Judges, except L. C. J. DE GREY, met to consider this case: and they were unanimously of opinion, That this *mould* was a *tool or instrument* mentioned in the former part of the statute, and therefore comprized under these general words; and *secondly*, as *a mould* is expressly mentioned by name in the first clause of the Act which respects the *making* or *mending*, it need not be averred to be a *tool or instrument* so mentioned.

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BUT after this opinion was given, a new doubt arose upon a different point in this case, which was:

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A mould is an instrument on which is *made and impressed* the similitude and stamp of the current coin.

WHETHER the mould which was found in the prisoner's custody, it having only the resemblance of a shilling *inverted*; *viz.* the convex parts of the shilling being concave in the mould, and *vice versa*, the head or profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which would *make and impress* the resemblance, stamp, &c. rather than an instrument on which the same *were made and impressed*, as laid in this indictment, the statute seeming to distinguish between such as will *make and impress* the similitude, &c. as the matrix, die, and mould; and such on which the same is *made and impressed*, as a puncheon, counter-puncheon, or pattern.

BUT on 19th June 1772, a great majority of the Judges were of opinion, that this evidence sufficiently maintained the indictment; because the *stamp* of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate, had it charged that "he had in "his custody a mould that would *make and impress* the simi- "litude, &c." and in this opinion some who otherwise doubted acquiesced.

THE prisoner died in gaol before judgment could be pronounced upon him.

CASE LII.

THE KING *against* SHARPLESS AND GREATRIX.

If a person, having ordered a tradesman to bring goods to his house, look out a certain quantity, ask the price of them, separate them from the rest, and then, by sending the tradesman home, on pretence of wanting other articles, take the opportunity of running away with the goods so looked out, with intent to steal them, it is *Larceny*; for as the sale was not completed, the possession of the *property* still remained in the tradesman. S. C. 2 East, 675.

AT the Old Bailey in May Session 1772, *John Sharpless* and *Samuel Greatrix* were convicted before MR. JUSTICE GOULD, present MR. BARON ADAMS, of stealing six pair of silk stockings, the property of *Owen Hudson*; but a doubt arising

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SHARPLESS AND GREATRIX'S CASE.

whether the offence was not rather *a fraud* than *a felony*, the judgment was respited, and the question referred to the consideration of the Judges upon the following case:

CASE. On the 14th March 1772, *Samuel Greatrix*, in the character of servant to *John Sharpless*, left a note at the shop of Mr. *Owen Hudson*, a Hosier in Bridge-street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings, at the Red Lamp in Queen-square. The hosier took a variety of silk stockings according to the direction. *Greatrix* opened the door to him, and introduced him into a parlour, where *Sharpless* was sitting in a dressing-gown, his hair just dressed, and *rather more powder all over his face than there was any necessity for*. Mr. *Hudson* unfolded his wares, and *Sharpless* looked out three pair of coloured and three pair of white silk stockings, the price of which, Mr. *Hudson* told him, was 14*s*. a pair. *Sharpless* then desired *Hudson* to fetch some silk pieces for breeches, and some black silk stockings with French clocks. *Hudson* hung the six pair of stockings which *Sharpless* had looked out, on the back of a chair, and went home for the other goods; but no *positive* agreement had taken place respecting the stockings. During *Hudson*'s absence, *Sharpless* and *Greatrix* decamped with the six pair of stockings, which were proved to have been afterwards pawned by *Sharpless* and one *Dunbar*, an accomplice in some other transactions of the same kind, for which the prisoners were indicted.

THE JUDGES were of opinion, That the conviction was right; for the whole of the prisoner's conduct manifested an original and preconcerted design to obtain a tortious possession of the property. The verdict of the Jury imports, That in their belief the evil intention preceded the leaving of the goods; but, independent of their verdict, there does not appear a sufficient delivery to change the possession of the property (*a*). 1 Shower, 58.

(*a*) See the case of A. Chiffers, T. Raym. Rep. 275, 2 East, Pleas Crown, 677. 683. and Rex. *v.* Pear, Old Bailey September Session 1779, *post*.

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CASE LIII.

THE KING *against* LOCKETT.

A forged draft on a banker is an order for the payment of money within 7 Geo. II. c. 22. although the person whose name is forged never kept cash at, or was known to, the banker. S. C. 2 East, 940.

AT the Old Bailey in June Session 1772, *Charles Lockett* was tried before MR. BARON PERROTT, present MR. JUSTICE ASTON, for forging an order for the payment of money; AND ALSO for uttering it, knowing it to be forged, with intention to defraud one *John Scholes, &c.* The order was in the words and figures following:

"LONDON, *February* 14, 1772.

"Mess. *Neale, James, Fordyce* and *Down*,

"PAY *to Mr. William Hopwood, or bearer, sixteen pounds ten shillings and sixpence.*

"*£.* 16: 10: 6 "R. VENNIST."

THE prisoner went to the shop of Mr. *Scholes*, a colourman, and bargained for a quantity of goods, amounting to 10*l.* 0*s.* 6*d.* He desired a bill might be made out, and said he would call in the afternoon and pay for them. He went away and took a small parcel of Prussian blue with him. He returned in the afternoon, seemingly in a great hurry; said his name was *William Thompson*, and that he lived at *Ware*, in *Hertfordshire*. He presented the order to pay for the goods, and Mr. *Scholes* gave him six pounds ten shillings in difference; but on presenting it for payment, no man of the name of *R. Vennist* had ever kept cash at the house of *Neale, James, Fordyce*, and *Down*; nor did the prosecutor know any such person existing; and it was in fact a fictitious name.

THE Jury found the prisoner *guilty* of uttering the order, knowing it to be forged; but as it appeared that no man of the name of *Vennist* had ever kept cash with these bankers, it was doubted whether this was an order for the payment of money within the meaning of the statute of 7 Geo. II. c. 22. the principle of *Mary Mitchel's Case* (1) being, that the words "*warrant or order*," as they stand in the Act, are synonymous, and expressive of one and the same idea, and in common parlance import that the person giving such

(1) Foster, 120.

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warrant or order hath, or at least claimeth an interest in the money or goods which are the subject-matter of that warrant or order; that he hath, or at least assumes to have, a disposing power over such money or goods, and takes on him to transfer the property, or custody of them at least, to the person in whose favour such warrant or order is made.

UPON this doubt, the case was referred to the consideration of the Judges; who, after very long consideration, at last agreed in Trinity Term 1774, that this was forgery, and in September Session 1774, MR. BARON PERROTT delivered their opinion to the following effect: The Judges are unanimously of opinion, "That this is an order for the payment of money within the meaning of the statute; for although no man of the name of *Vennist* had in fact ever kept cash at *Fordyce*'s banking-shop, yet the nature of the order assumes that there was cash there in the name of the drawer, which he had taken upon him to transfer to the person in whose favour the order is made; for it would be a very forced construction of the statute to say, that the forgery of a *fictitious name*, with intention to defraud, is not within the intention of it (*a*)."

(*a*) To the *Manuscript Note* of this case is subjoined the following observation;—In *M. Mitchel*'s Case the Judges seem to have considered the meaning of the word "order" as importing *a right* on the part of the person who is supposed to have made it, and a *duty* on the part of the person on whom it is made. It follows, therefore, that whenever a forged order for the payment of money, or for the delivery of goods, is drawn in such terms as to induce the world to believe that it *must*, in common honesty, and the regular course of things, be complied with, it is within the meaning of the Act; but where it seems to leave compliance or refusal *optional*, and applies rather to the *favour* than the *justice* of the person on whom it is drawn, it is not within the penalty of the statute; for on such an order the party taking it can place no *reliance*; the terms of it import that compliance *may* be refused: and therefore, if it be refused, he cannot pretend that he is *deceived*; for a man has no right positively to expect performance when requisition is not *a right* and performance *a duty*. In *Mitchel*'s *Case* it is rather *a desire* that a thing should be done, than *an order* to do it. *A desire* implies that the party has not *a right*, and it is *the usurpation of another's right* which the legislature intended to punish and prevent. See Willoughby's Case, 2 East, 582, and 2 East, 936.

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THE prisoner received sentence of death on the last day of September Session 1774; but in December Session following received a pardon on condition of being transported for life (*a*).

(*a*) At the Old Bailey 1774, *Abraham Abrahams* was indicted on the same statute for an offence precisely similar in all its circumstances to the present, wherein the judgment was respited for the opinion of the Judges, as *Lockett's Case* still remained undetermined, and they were both decided at the same time, and the prisoners received judgment of death in the July following, 2 East, 941.

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CASE LIV.

THE KING *against* LAD.

An indictment for murder must state that the prisoner gave the deceased a mortal wound.

2 Hale 186, 1 Hawk, c. 23. s. 82. Kely, 125. 1 East, 343.

AT the Summer Assizes at *Maidstone*, for the County of *Kent*, held on the 2d August in the year 1773, *William Lad* was tried for the wilful murder of *Frances Peed*, a female infant of only nine years of age.

THE particular circumstances of this case are too shocking to the feelings of modesty to detail. The prisoner had several times committed rape on the body of the deceased, in consequence of which a mortification ensued, which was the cause of her death.

THE Jury found the prisoner guilty; but as it was an entire new case, the judgment was respited, and the legality of the indictment submitted to the opinion of the Judges.

In one MS. report of this case it is said that the opinion was not given until Hilary Term, 1779.

ON the first day of Easter Term following, all the Judges, except L. C. J. DE GREY, assembled at Serjeants-Inn Hall. They gave no opinion as to the general question, Whether an indictment for *murder* could be maintained for this offence? but they unanimously agreed, That in the present case the indictment was bad, because it only said he did grievously lacerate and wound the private parts and inside of the body of the said *Frances Peed*, of which said laceration and bruises so given by the said *William Lad*, in manner aforesaid, she

the said *Frances Peed*, on the said second of April, until the 6th of July following, languished and then died, &c. but had omitted to aver, "thereby giving the said *Frances Peed* one "mortal wound or bruise," &c. (*a*)

THE indictment stated, that the child was of tender years, *viz.* about the age of *nine years*; but one of the Judges thought that it ought to have been positively *averred* that the girl was *under ten years* of age, as this mean of death could not well be thought murder, if she were above that age, and voluntarily consented to the ravishment (*b*).

(*a*) But see 2 Hawk. Pl. ch. 23. s. 81.

(*b*) The statute 18 Eliz. c. 7. makes it felony without the benefit of clergy, "carnally to know and abuse any woman-child under the age of "ten years;" in which case her consent or non-consent is immaterial. Cro. Car. 332. 3 Burr. 1696. 1 Hale, 631. 4 Bl. Com. 212.

THE KING *against* RICHARD WALKER.

CASE LV.

A prisoner cannot be convicted on the 16 Geo. II. c. 31. for facilitating an escape, if it appear either by the indictment or on evidence that the commitment was for *suspicion* only.

THIS was a Case reserved by THOMAS NUGENT, Esq. Common Serjeant of the City of London at the Old Bailey, in July Session 1773.

THE prisoner was indicted on the 16 Geo. II. c. 31. for conveying into the prison of the Poultry Compter a certain instrument proper to facilitate the escape of prisoners, with intent to aid and assist the escape of *Henrietta Lake*, widow, he well knowing the said *Henrietta* to have been lawfully committed to the said prison, *upon suspicion* of "forging a "promissory note of one hundred pounds, with intent to "defraud one *Elizabeth Whitelock*," *&c.*

THE Counsel for the prisoner objected to the validity of the indictment, because it appeared upon the face of it that the warrant of commitment was upon suspicion, and the Act of Parliament only makes the offender guilty in cases where the prisoner "is committed to, or detained in, any "gaol for treason or *felony expressed* in the warrant of com-

1773. " mitment or detainer;" which could not be construed to extend to a commitment on *suspicion* only.

WALKER'S CASE. See Rex *v.* Cox, *ante*, page 71, case 38; and Rex *v.* James Davis, *post*, Hereford Summer Assizes 1788.

UPON this objection the case was reserved for the opinion of the Judges; and in Hilary Term 1774, they were unanimous (LORD CHIEF JUSTICE DE GREY absent), That the indictment was erroneous; for, being a parliamentary felony, it was necessary that the indictment should substantially pursue the words of the statute. The two kinds of commitments are essentially different from each other; for a prisoner may be admitted to bail on a commitment on suspicion only, but not on a commitment for treason or felony clearly and plainly expressed in the warrant. By the words " treason or felony " expressed in the warrant," the legislature evidently meant the offence should be " clearly and plainly expressed," which can never be the case when the commitment is on *suspicion* only (*a*).

(*a*) At the Lent Assizes for Maidstone 1785, *John Greenif* was indicted upon this statute, and it appearing *upon producing the warrant in evidence*, that it was a commitment *on suspicion*, MR. JUSTICE GOULD reserved the case for the consideration of the Judges, who were unanimous that it was not within the Act. *MS.*—At the Old Bailey in April Session 1785, *William Gibbons* was indicted for this offence before NARES J.; but the warrant being *on suspicion of burglary*, the prisoner was acquitted.—In Hilary Term, 11 Geo. III. *Gregory* was committed on *suspicion* of having feloniously killed one *J. Lloyd*; and on being brought up to the King's Bench on a *Habeas Corpus*, the return to which set forth the warrant of commitment, LORD MANSFIELD said, a man committed on *suspicion* only has a *right* to be bailed on the *Habeas Corpus* Act.—See Caldecot's Decisions, Page 296, Note (*e*).

CASE LVI.

THE KING *against* WILLIAM GULLY.

A SIGN MANUAL promising a pardon to a convict, will not restore him to his competency as a witness.

AT the Old Bailey in July Session 1773, *Patrick Murphy* and three others were indicted before MR. SERJEANT GLYNN, Recorder, present MR. JUSTICE WILLES, for a highway robbery on *Kenneth Mackenzie, Esq.* Earl of *Seaford*.

THE principal witness was one *William Gully*, an accomplice; to whose competency to give evidence MR. SILVESTER

1773.

GULLY'S CASE.

objected, upon the ground of his being a convict under sentence of death; to prove which, he produced the record of his conviction in December Session 1772, and a witness to identify his person.

MR. LUCAS, Counsel for the prosecution, produced the KING'S SIGN MANUAL, under which the prisoner had been discharged, on his giving security to appear and plead the next general pardon that should come out.

BUT THE COURT said, the objection was incontrovertible; for nothing less than a pardon under the great seal can restore the competency of the witness, and it was impossible for the Court judicially to take notice of his Majesty's intention to pardon, which is the extent of what the SIGN MANUAL has signified. It was determined by the Judges in the case of *the Earl of Warwick* (1), that if a man be convicted of felony that is within clergy, and pray his clergy, and it is allowed, but the burning in the hand is respited, and there is a warrant for his pardon, that he cannot be a witness until it has passed the great seal (2), and he has produced and pleaded it *sub pede sigilli*; for as it is for his benefit, it is presumed to be in his custody (3), and it would be error to grant him the benefit of it until it has been allowed (4); but letters under the KING'S SIGN MANUAL cannot be pleaded as a pardon (5).

(1) 11 Will. 3. 5 State Trials 166.
(2) 2 Hawk. 558.
(3) Staunf. 103. Cro. Jac. 70. 317. Cro. Car. 441.
(4) Cro. Eliz. 153.
(5) 1 Bl. Rep. 479. Foster, 62.

THE prisoner was accordingly acquitted.

THE KING *against* JOHN STERLING.

CASE LVII.

AT the Old Bailey in September Session 1773, *John Sterling* was tried before Mr. JUSTICE NARES, present MR. JUSTICE ASHHURST, and MR. SERJEANT GLYNN, Recorder, for forging the last will and testament of *Elizabeth Shuter*, spinster, with intention to defraud the South-Sea Company.

To forge *a will* is a capital offence, although the supposed testator is living. S. C. 2 East, 950.

THERE were five other counts for uttering and publishing the said will, knowing it to be forged; and charging the pri-

1773.

STERLING'S CASE.

soner with an intention to defraud, first, *Elizabeth Shuter*; and secondly, *Daniel Crofts*.

THE style of the Company was read from THE CHARTER, which corresponded with the style of the Company as set forth in the indictment.

THE circumstances of this case, as they appeared upon the evidence, were as follow:

THE prisoner, *John Sterling*, was a young man inhabiting chambers in the Temple, and *Elizabeth Shuter*, the supposed testatrix of the will, was his laundress. On the 20th February 1773, the prisoner applied to the clerk of Mr. *Bishop*, a Proctor in Doctors' Commons, in order to prove the will of one Mrs. *Shuter* deceased, whom he represented to have lived, during her lifetime, at *Tooting* in *Surrey*. He accordingly took the oath before the Surrogate, and the probate of the will was made out and delivered to him (1). On the 22d February he took the probate to the South-Sea House, and entered it there with the proper clerks; in consequence of which on the 25th he went to the proper offices and sold out 350*l.* stock.

(1) At the time of the trial, the probate was not recalled. See the case of the King *v.* Vincent, Strange, 481. and Duchess of Kingston's Case, 11 St. Tr. 222.

THE will was produced, in which Mrs. *Shuter* was made to give to her "dear master and very good friend *John Ster-* "*ling*, of the Middle Temple, sole executor, 350l. South- "Sea annuities, and all her other estate and effects in trust, "to make sale of, &c. and out of the money arising from "such sale to pay all her just debts, &c. then to retain to "his own benefit 30l. for his trouble as executor, and divide "the residue among her relations," who were specified; and it purported to be signed and delivered by her in the presence of two witnesses.

ELIZABETH SHUTER was herself produced to prove that the signature to the will was not her hand-writing, and the Jury found the prisoner guilty; but the judgment was respited upon a doubt, Whether, as the supposed testatrix was living, the prisoner was legally convicted of having forged her *last will* and testament; there being no such instrument as a last will and testament, in contemplation of law, until after the death of the person making it.

1773.

STERLING'S CASE.

Fos. C. L. 116.

See the case of James Cogan, *post*, 1787.

BUT upon the authority of the case of *Ann Lewis*, in MR. JUSTICE FOSTER'S Reports, THE JUDGES were unanimously of opinion, That an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to be good and valid, as to the purposes for which it was intended to be made.

The prisoner received sentence of death.

THE KING *against* CONRAD SHEPPARD.

CASE LVIII.

If a Sheriff return the Jury to try an indictment in which he is prosecutor, the objection must be made by way of challenge; and cannot be moved in arrest of judgment.

39 Hen. VI. pl. 41. 30. Assize, pl. 12. 2 Roll. Abr. 673. Hobart. 70. Cro. Jac. 383.

AT the Old Bailey in October Session 1773, *Conrad Sheppard* was tried before MR. SERJEANT GLYNN, Recorder, for stealing two pounds and a half of hard soap, value fifteen-pence, the property of *William Plomer*, *Gabriel Heath*, and *Philip Allen*.

THE prisoner was a weekly servant to the prosecutors; and the fact being clearly proved, the Jury found him guilty of stealing to the value of ten-pence.

When he was called up to receive sentence, his Counsel objected, in arrest of judgment, that Mr. *Plomer*, one of the prosecutors, was Sheriff, and had returned the Jury who tried the prisoner; whereas it should in this case have been returned by the Coroner, and not by the Sheriff. To support this objection he cited 2 *Hawk. P. C.* c. 9. s. 45.

UPON this objection the judgment was respited, and the case referred to the consideration of THE TWELVE JUDGES.

IN a few Sessions afterwards their opinion was delivered, That the objection came too late in arrest of judgment; and that it should have been taken by the prisoner by way of *challenge* to the Jurors.

1773.

CASE LIX. THE KING *against* THOMAS JONES.

A prisoner *mutus et surdus à nativitate*, may be arraigned for a capital offence, if intelligence can be conveyed to him by signs or symbols. See *post*, the case of Eliz. Steel. See also January Sess. 1786, where a deaf and dumb person was admitted to give evidence. 2 Hawk. P. C. ch. 46. s. 28. in notes.

AT the Old Bailey in December Session 1773, *Thomas Jones* was indicted on the statute 12 Ann. c. 7. for stealing five guineas, the property of *John Goldwell*, in his dwelling-house.

ON being put to the bar to be arraigned, he appeared to be deaf and dumb. The Court directed the Sheriff to impannel a Jury; and a Jury being *immediately* returned, they were charged to try, whether the prisoner stood mute through obstinacy, or by the visitation of God. After hearing evidence, they brought in their verdict, "Mute by the visitation of God." But it appearing that he had for some time past been in the habit of communicating his ideas with a person of the name of *Fanny Lazarus*, she was sworn, and examined upon her oath, as to the fact of her being able to make the prisoner understand what others said; and it appearing that he was capable of receiving intelligence from her by means of signs, he was arraigned, put upon his trial, convicted of the simple larceny, and received sentence to be transported.

CASE LX. THE KING *against* ROBERT PALMER.

An indictment on 8 & 9 Will. III. c. 26. s. 6. for putting off bad money, must state that it was "not cut in pieces."

THE prisoner, *Robert Palmer*, was indicted at the Old Bailey in December Sessions 1773, before MR. JUSTICE BLACKSTONE, on the statute of 8 & 9 Will. III. c. 26. s. 6. which enacts, "That if any person or persons shall take, "receive, pay or put off any counterfeit milled money, or "any milled money whatsoever unlawfully diminished and "*not cut in pieces* at and for a lower rate or value than the "same by its denomination doth or shall import or was "coined or counterfeited for, they shall be guilty of felony."

THE indictment charged that the prisoner had put off to one *James Mills* ten pieces of counterfeit milled money, made and counterfeited to the likeness and similitude of the current

1773.

PALMER'S CASE.

silver coin of this realm called shillings, at the rate of thirty of such counterfeited pieces for twenty-one pieces of the current silver coin of this realm called shillings, being a lower value than they by their denomination did import, &c. against the form of the statute. There were two other counts charging the offence in different ways; but it was not stated in any of the counts, that the counterfeit money charged to be put off was *not cut in pieces.*

AN objection was taken that the words of the statute must be precisely pursued;

AND THE COURT was clearly of opinion that the indictment was bad; for the words "not cut in pieces," are a material part of the description of the offence.

See Rex *v.* Cox, *ante*, case 38; and Rex *v.* James Davis, *post.*

1774.

CASE LXI.

THE KING *against* WILKES.

A receiver of stolen goods may be tried for the misdemeanor, though the prosecutor might have taken the principal but neglected so to do. S. C. 2 East, 746. See now the 22 Geo. III. c. 58.

AT the Assizes holden at *Warwick* on the 3d March 1774, *William Wilkes* was convicted on the statutes of 3 Will. & Mary, c. 9. s. 4. and 5 Ann. c. 31. s. 5. before MR. SERJEANT SAYER, of a misdemeanor, in knowingly receiving goods which had been stolen from one *Richard Innis.* But the judgment was respited, and the question, Whether the indictment was maintainable? was submitted to the consideration of all the Judges (*absente* L. C. J. DE GREY) at Serjeants-Inn Hall, on the first day of the ensuing Trinity Term, upon the following:

THE statute of 5 Ann. c. 31. s. 6. after making it felony to buy and receive stolen goods, provides, "That if any such "principal felon cannot be taken so as to be prosecuted and "convicted for any such offence, yet nevertheless it shall "and may be lawful to prosecute and punish every such "person and persons buying or receiving any goods stolen "by any such principal felon, knowing the same to be stolen, "as for a misdemeanor, to be punished by fine and impri-"sonment, or such other corporal punishment as the Court "shall think fit, although the principal felon be not before "convicted of the said felony."

1774.

WILKES'S CASE.

It appeared in evidence, that *Richard Innis* the prosecutor had been in company with *a person* in *London* on the third and fourth days of the month of November preceding, who confessed himself to be the principal felon, and that *Richard Innis* had then an opportunity, on each of those days, of taking the said person into custody; but that he had neglected so to do, because the said person had promised to go down to *Warwick* to give evidence against the person to whom the goods were sold; that he *Innis* did afterwards endeavour to apprehend him, when he afterwards met him by appointment, but that he was then rescued by some of his companions, and that although he had immediately applied for a warrant to retake him, no opportunity so to do had since that time occurred; and that the principal felon was not in fact taken at the time of finding the indictment.

Foster, 74. and 373. 2 Hawk. c. 29.

The Judges in Trinity Term 1774, were divided in their opinions upon this case. Four of them thought, that as the principal felon was known, and might have been taken, the conviction was improper, because the statute allows an indictment for the misdemeanor only "if the principal felon "*cannot be taken.*" And that as *Innis* had had it once in his power to take the principal, and had neglected to do it, it took the case out of the statute 5 Ann. c. 31. But seven of them were of opinion, That the word *cannot* in the statute means if he cannot be taken at the time of the prosecution for the misdemeanor, and as it did not appear from the finding of the Jury, that the principal felon was out of custody by collusion or could have been taken, *so as to be prosecuted and convicted* at the time the present indictment was found, the verdict was right: for although *Innis* had acted weakly and negligently, in not securing him upon the first interview, he had afterward used all due diligence to apprehend him, and had been prevented from so doing on the second interview by the force with which he was rescued (*a*).

(*a*) But now by 22 Geo. III. c. 58. receivers of any stolen goods and chattels (except lead, iron, brass, copper, bell-metal, and solder, the receiving of which is provided for by the 29 Geo. II. c. 30.) may be prosecuted for the *misdemeanor*, although the principal felon be not before con-

THE defendant was sentenced to pay a fine of 300*l.* and suffer one year's imprisonment. 1774.

WILKES'S CASE.

victed, or whether he is amenable to justice or not. And upon this Act it hath been determined, that the unconvicted principal is an admissible witness against the receiver. Haslam's Case, *post.* Old Bailey May Session 1786.

THE KING *against* RICHARD COOK. CASE LXII.

AT the Lent Assize for the county of *Warwick* in March 1774, *Richard Cook* was tried before MR. SERJEANT SAYER on the 14 Geo. II. c. 6. and 15 Geo. II. c. 34. for stealing a cow, value 5*l.* the property of *Edmund Chambers.*

An indictment for stealing *a cow* cannot be supported by evidence of stealing *a heifer.* S. C. 2 East, 616.

THE larceny was very clearly proved; but it appeared upon the evidence, That the animal stolen was a female beast only two years and a half old, that had never had a calf; and that a female beast of the cow kind, how old soever, if she have never had a calf, is always called AN HEIFER.

UPON these facts being found, it was submitted by the prisoner's Counsel, that the evidence did not support the charge in the indictment; and therefore the Court ought to direct the Jury to acquit the prisoner. But as the possibility of preferring *a better* indictment at the then assize was precluded by the Grand Jury being discharged, the learned Serjeant left the case generally with the Jury; and they found the prisoner *guilty,* subject to the opinion of THE TWELVE JUDGES upon the question submitted by the prisoner's Counsel.

THE judgment was accordingly respited, and the question referred. And all the Judges (*absente* DE GREY, C. J.) were of opinion, That as the statutes upon which the indictment was founded, mention both *heifer* and *cow,* in describing the several animals they were designed to protect, the *one* must have been used in contradistinction to the *other;* and therefore that the evidence did not support the indictment, and the prisoner was intitled to his acquittal.

At Serjeants' Inn Hall 20 April 1774.

1774.

CASE LXIII. THE KING *against* SKUTT.

To steal a letter out of the Post-Office containing *money* is not an offence within the 7 Geo. III. c. 50. if the offender *be a servant of the Post-Office.* S. C. 2 East, 582.

AT the Old Bailey July Session 1774, the prisoner was tried before MR. JUSTICE NARES, present MR. JUSTICE WILLES, and MR. SERJEANT GLYNN, Recorder, on 5 Geo. III. c. 25. and 7 Geo. III. c. 50. The Indictment stated that *Timothy Featherstonehaugh Skutt*, late of *London* labourer, after, &c. to wit on the 20th May 1774, at the parish of *Saint Mary Woolnorth* in the ward of *Walbroke* in *London* aforesaid, feloniously did steal and take from the General Post-Office there situate *one letter* with the name *Hannah Ball* thereunto subscribed, bearing date the 19 May 1774, and directed to *Widow Ball* at *Longbridge Deveret*, *Warminster*, *Wells*, post paid 4*d.*; and one other *letter* with the name *John Woods* thereunto subscribed, bearing date 19 May 1774, and directed "to "*Mr. Woods* at *Hawarden*, *Flintshire*," against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity. THE SECOND COUNT was the same as the first, only charging that each of the letters was of the value of *five shillings and three pence*, and that they were respectively the property of *Hannah Ball* and *John Woods*. THE THIRD COUNT was the same as the second, only charging the letters to be respectively the property of *Mary Ball* and *Richard Woods*. The two remaining counts charged the prisoner with the stealing and taking of *John Woods'* letter only, laying it to be the property 1st, of *John Woods*, and 2dly, of *Richard Woods*.

IT appeared in evidence, that the prisoner was, at the time the fact was committed, *a sorter of letters* in the Post-Office; that on the 20th May being suspected of having purloined letters he was searched, and the two letters mentioned in the indictment were found upon him concealed in his breeches. They were traced from the hands of *Hannah Ball* the writer of them into the possession of the prisoner *as a sorter of letters*; and it was proved by her, that when they were sealed up, and put into the receiving-house, each of them contained *a*

1774.

SKUTT'S CASE.

five-and-three-pence in gold coin; but neither of them any security relating to the payment of money. The statute 7 Geo. III. c. 50. s. 1. makes it a capital offence for any *deputy, clerk, agent, letter-carrier, post-boy or rider, or any other officer or person whatsoever employed* in receiving, stamping, *sorting*, charging, carrying, conveying or delivering Letters or Packets, or in any other business *relating to the Post-Office*, to secrete, embezzle or destroy, any packet or letter inclosing any of the *securities* therein-mentioned, or to steal and take out of any letter or packet that shall come to his, her, or their hands or possession any of the said *securities*; and then by THE SECOND SECTION it enacts "That if *any* "*person or persons whatsoever* shall rob any mail or mails, "in which letters are sent or conveyed by the post, of any "letter or letters, packet or packets, bag or mail of letters; "*or shall steal* and take from or out of any such mail or "mails or from or out of any bag or bags of letters sent or "conveyed by the post, or from or *out of any Post-Office* or "house, or place for the receipt or delivery of letters or "packets sent to or to be sent by the post, *any letter* or let-"ters, packet or packets, although such robbery, stealing, "or taking shall not appear or be proved to be a taking "from the person or upon the king's highway, or to be a "robbery committed in any dwelling-house, or any coach-"house, stable, barn or any out-house belonging to a dwell-"ing-house, and although it should not appear, that any "person or persons were put in fear by such robbery, steal-"ing or taking, yet such offender or offenders shall respect-"ively be deemed guilty of felony without benefit of clergy."

See 42 Geo. III. c. 81.

THE prisoner's Counsel submitted to the Court, that this case was not within the statute as the letter contained *money* and not any *security* relating to the payment of money mentioned in the Act.

THE COURT were of the same opinion, and the prisoner was accordingly acquitted on this indictment; but he was detained, indicted, tried, and convicted of stealing the two quarter-guinea pieces, as for a simple grand larceny at common law; and was transported.

1774.

CASE LXIV. THE KING *against* PARRY AND ROBERTS.

A felony committed in *Anglesea* may be tried in the county of *Salop*, as the next adjoining *English* county to *Wales*.

S. C. 2 East, 773.

THE prisoners were indicted at the *Salop* Summer Assizes 1774, in separate indictments upon the statute 26 Geo. II. c. 19. for feloniously plundering and stealing divers goods, part of the cargo of the *Charming Jenny*, a vessel wrecked on the coast of *Anglesea*.

THE prisoners were found *guilty*, upon very clear evidence; but it was moved in arrest of judgment, that the offence having been committed in the Isle of *Anglesea*, the prisoners could not be tried in the county of *Salop*, because the 26 Geo. II. c. 19. which takes away clergy from this offence, says, That where the offence is committed in *Wales*, the prosecution may be carried on in the next adjoining *English* county; and *Cheshire*, and not *Salop*, is the next adjoining English county to *Anglesea*.

IT was also observed by the prisoner's Counsel, that there is a difference in the penning of 26 Hen. VIII. c. 6. s. 6. which gives the general jurisdiction to the *English* Judges to try offences committed in *Wales*, and that of the 26 Geo. II. c. 19. s. 8.; the former of which says, "that the Justices of "Gaol delivery, &c. in the shire or shires of *England where* "*the King's writ runneth*, next adjoining to the lordship, "marches or other place in *Wales* where the offence shall "be committed, shall have full power and authority, &c." But the 26 Geo. II. says the prosecution may be carried on in the next adjoining *English* county, without adding "where "the King's writ runneth."

To prepare for this objection, the prisoner's Counsel called two witnesses to prove *Cheshire* the next adjoining county to *Anglesea*; but to give the prisoners the benefit of this objection, if there was any weight in it in point of law, the fact was taken for granted, and the judgment was respited till the next assizes.

IT was accordingly submitted to the JUDGES, Whether the 26 Hen. VIII. c. 26. does not extend to all felonies,

1774.

though created or made more penal by any subsequent statutes? If not, Whether the statute 26 Geo. II. c. 19. shall not be taken to mean the same as the 26 Hen. VIII. c. 26.?

PARRY AND ROBERTS'S CASE.

THE JUDGES were all of opinion, That the conviction was proper, as *Chester* is not, properly speaking, an *English* county, and the King's writ does not run there. Besides, the words in 26 Geo. II. "in the next *English* county," being only a description of the law as it then stood, it must be construed according to the statute 26 Hen. VIII. c. 26.; and the constant practice has been to consider *Salop* as the next *English* county (*a*).

Vide Althoe's Case. 8 Mod. 136. 34 & 35 Hen. VIII. c. 26. s. 85, 86.

(*a*) It is now determined by the Judges, that the statute, 26 Hen. VIII. c. 6. extends to felonies subsequently created, and therefore that a prisoner may be tried in the county of Hereford, for an offence committed against 49 Geo. III. c. 80. for having forged excise stamps in his possession at Llangeny, in the county of Brecon, Rex *v.* George Window, 3 Campbel's Rep. 78.

THE KING *against* MORRIS.

CASE LXV.

ROBERT EDWARDS was tried before MR. JUSTICE ASHHURST, at the Old Bailey, in September Session 1774, for robbing *Thomas Morgan* on the highway of a gold watch, chain, and seals; and the same indictment charged, "That FRANCIS "*Morris* the goods and chattels above-mentioned, so as "aforesaid feloniously stolen, taken, and carried away, felo- "niously did receive and have; he the said THOMAS *Morris*, "then and there, well knowing the said goods and chattels "last mentioned to have been feloniously stolen, taken, and "carried away."

If an indictment be in itself good, tautologous words shall be rejected as surplusage.

THE prisoners were found *guilty*; but it was moved in arrest of judgment, that the indictment having alleged that *Francis Morris* had received the property, and that *Thomas Morris* knew it to have been stolen, the conviction could not be supported as against the accessary, for that the fact of receiving and the knowledge of the previous felony must reside in the same person; whereas the indictment charged

Cro. Eliz. 697.

1774. them in two different persons, one of the name of *Francis*, and the other of the name of *Thomas*.

MORRIS'S CASE.

THE point was reserved for the opinion of THE TWELVE JUDGES, upon the following question, Whether the words "*the said Thomas Morris*," could be rejected as surplusage? and they were unanimous, That as the indictment would be *sensible* and *good* without these words, they might be struck out as superabundant and unnecessary.

1775.

CASE LXVI.

THE KING *against* POWELL.

An infant cannot, under any circumstances, be admitted to give evidence except upon oath.

THIS was an indictment for a rape, tried before MR. JUSTICE GOULD at the Assize for *York* in the year 1775.

The prosecutrix was an infant between six and seven years of age; and upon the presumption of law, that a child under the age of seven years is incapable of understanding the nature of an oath, and is therefore incompetent to take it, she was admitted to give her evidence against the prisoner without being sworn. The prisoner was acquitted upon her testimony.

THE learned Judge, however, conceiving that by the laws of *England* every prisoner must be convicted upon legal evidence, and that, especially in criminal cases, no evidence can be legal unless it be given upon oath, he mentioned the case to the Judges; and the majority of them were of opinion, that in criminal cases no testimony can be received except upon oath (*a*).

(*a*) LORD HALE, vol. i. page 634, says, That if an infant appear unfit to be sworn, the Court ought to hear her *information* without oath; but he admits that such evidence is not of itself sufficient testimony to convict, because it is *not upon oath*. In the argument in Omichund *v.* Barker, Mich. Term 1744, it was said by *L. C. J. Lee*, that it was determined at the *Old Bailey*, upon mature consideration, that a child cannot be admitted as a witness except upon oath; and *L. C. B. Parker* likewise said, that it was so ruled at Kingston Assizes before *Lord Raymond*, where, upon an indictment for a rape, he refused the evidence of a child without oath. 1 Atkins, 21. See also the case of the King *v.* Steward, 1 Strange, 701. and the King *v.* Brasier, *post*. Summer Assize, Reading, 1778.

1775.

THE KING *against* KELSEY FRY. CASE LXVII.

THE defendant, *Kelsey Fry*, having been apprehended for assaulting one of the keepers of the *New Forest* in *Hampshire*, and carried before a Magistrate, was admitted to bail on the condition of his appearing to answer such indictment as might be preferred against him for the said assault.

On an indictment being found for an assault, if the defendant enter into a recognizance to appear, *enter*, and try his traverse, he cannot be tried, without entering his traverse, under the gaol delivery, except he withdraw his plea, or give the prosecutor notice.

AT the ensuing Lent Assizes for the county of *Southampton* a bill was preferred against him for this assault, which bill was found by the Grand Jury. On his arraignment he pleaded *Not Guilty*, and entered into a recognizance to appear, *enter*, and try his *traverse* at the then next Assizes.

ON the day before the opening of the commission for the next Summer Assizes, he surrendered himself to prison in discharge of his bail; and to avoid paying for the issue-book, the entry of his traverse, and all other court fees, he endeavoured to be tried under the commission of gaol delivery. His trial under this commission, however, was opposed by the *Judges Marshal*, and by the *Clerk of Assize*, on the ground that the defendant, by not entering his traverse, had not performed the condition of his recognizance.

MR. JUSTICE NARES entertaining some doubts whether, as the defendant was in custody, he could refuse to try him, directed him to be tried as any common gaol traverse; but, in order to settle the practice in future, he said, that he would take the opinion of the Judges thereon.

ON the first day of Hilary Term 1776, the Judges met at Lord *Mansfield*'s Chambers in Serjeants-Inn, and MR. JUSTICE NARES submitted the case to their consideration; and they were unanimously of opinion, That the defendant ought not to have been tried, he not having performed the condition of the recognizance. But they all thought that in this case he might have come in, and moved to withdraw his plea of *Not Guilty*, and have pleaded *Guilty* without entering his traverse, either on an agreement with the prose-

Ld. Mansfield, L. C. B.
Smythe, J. Gould, J. Aston, J. Ashhurst, J. Nares, B. Eyre, B. Burland, B. Hotham.

1775. cutor, or on giving him proper notice of his intention so to do. The Judges likewise agreed, that if, before he came in to plead, he had given the prosecutor ten days notice that he would at the same time try his traverse, he might do it.

FRY'S CASE.

CASE LXVIII.

THE KING *against* RICHARD BAKER.

An attachment issued and signed by the County Clerk in his own cause, is legal process; and if the officer be resisted and killed in the execution of it, such homicide will be MURDER.

S. C. 1 East, 323.

AT the Summer Assize for the county of *Somerset* in the year 1775, *Richard Baker* was tried before MR. BARON BURLAND for the wilful murder of *Peter Maggs*. The Jury found the prisoner *guilty*; but a question of law having arisen upon the evidence, the learned Judge respited the judgment, and reserved the case for the consideration of THE TWELVE JUDGES, upon the following circumstances.

BAKER, the prisoner, was indebted to one *Stringer*, in a small sum of money for fees and disbursements due to him as Clerk of the County Court; to which office *Stringer* had been regularly appointed by the Sheriff. The prisoner having been summoned for this debt, and neglecting to attend, *Stringer*, pursuant to the invariable practice of his office, made out and signed, as County Clerk, AN ATTACHMENT against the prisoner, which is the next process to a summons; by which the Sheriff commanded *Peter Maggs* the deceased and others, on the part of the King, to attach the prisoner by his battle, goods and chattels, to appear at the next County Court, to answer *Stringer* in a plea of trespass on the case.

THIS attachment, thus made out and signed by *Stringer*, the County Clerk, as such, to compel an appearance in his own cause, was delivered by him to *Maggs*, an officer of the Court, in order to be executed upon the prisoner *Baker*; and it was proved, that the County Clerk is the only officer who makes out the process of the County Court; and that the Under-Sheriff never does issue such process.

ON the morning the attachment was made out, one of the officers named in it called at the prisoner's house, and asked

him why he did not settle with *Stringer*; to which the prisoner replied, that *Stringer* might be *damned*. The officer then told him there was an attachment against *him* in the hands of *Maggs*, who was specially named in it, and that he, the officer, would call on his return with *Maggs* to attach him. The prisoner asked, what he would attach. The officer replied, "The clock." The prisoner answered, "*You "may call and be damned; I'll be ready for you.*" About four o'clock *Maggs* and the other officer went to the prisoner's house. *Maggs* alighted from his horse, in order to go into the house to execute the attachment. The front-door of the shop was divided into two parts; a hatch below, and an upper part which was open. *Maggs* put his arm over the hatch to open it; upon which a woman in the shop, who commonly passed for the prisoner's wife, but in fact was not so, seized *Maggs* by the collar of his coat, and endeavoured to prevent his getting into the shop. *Maggs* however pushed forward, and got beyond the door-way. The prisoner, who was in the shop, immediately called to the woman, "Damn you, *Bland*, "stand away." *Maggs* answered, "The attachment is not "against *you*; it is against your *goods*." The prisoner replied, "If you attempt to come one inch farther I'll shoot "you." *Maggs* made an effort to go forward, and the prisoner, who was standing at the distance of about nine feet, immediately cocked his gun at the deceased. The deceased turned round, and endeavoured to release himself from the woman, who was still holding him. He gave her a violent push in order to get away. At that instant the prisoner discharged his gun, and wounded the deceased in the left hip. The woman slapped the door to, and locked it. The deceased exclaimed he was a dead man; and after walking a few steps across the street dropped down. The prisoner then looked out of his shop, and said, "*Damn him, I told him I "would do for him;*" and on being asked by a by-stander how he came to shoot the man? he replied, "I would do it "if it were to be done again." *Maggs* languished two days, and then died.

See Lee *v.* Gansel, Cowp. Rep. 1. and Foster, 320.

THE prisoner's Counsel contended, That the process being

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made out by *Stringer*, the County Clerk, *in his own cause*, was illegal and void (*a*); and therefore the killing of *Maggs*, while he was forcibly attempting to enter the prisoner's house to execute such illegal process, could not amount to more than *Manslaughter*.

1 Hale, 463. Strange, 499. 6 St. Tr. 195. Foster, 29, 135, 308, 319. 9 Co. 66, 68. Cro. Jac. 280, 486. 10 St. Tr. 462. Cowp. 3. 1 Hawk. P. C. 129, 130.

ON the first day of Michaelmas Term 1775, the Judges assembled at Serjeants'-Inn Hall to consider this case; and they were unanimously of opinion, That the attachment was legal. The suitors are the Judges of the County Court, and the direction of the attachment is in fact the Sheriff's command on the part of the King. In the issuing of it the County Clerk acted merely in a ministerial capacity, and not as Judge in his own cause; and as the death has been occasioned by unlawfully resisting the execution of lawful process, the prisoner has been properly found guilty of the crime of Murder.

(*a*) Some years ago in a case of Murder, a Magistrate who kept by him a number of *blank warrants ready signed*, on being applied to, filled up one of them, and signed and delivered it to the officer, who, on endeavouring to arrest the party, was killed; and the Judges were of opinion, that this was murder in the person killing the officer, and he was executed accordingly. Per LORD KENYON, C. J. in the case of Rex *v.* Winwick, 8 Term Rep. 455. But see John Stevenson's Case, 10 St. Tr. 462. and East's Pleas of the Crown, ch. 5. s. 87.

CASE LXIX.

THE KING *against* GEORGE WILLIAMS.

A forged order on a tradesman in the name of a customer, requesting that the goods mentioned in it might be delivered to the bearer, is not within 7 Geo. II. c. 22. if the customer has no interest in the goods mentioned.—S. C. 2 East, 937.

THIS was a case reserved by MR. JUSTICE NARES from the Summer Assizes for the county of *Southampton* 1775, for the opinion of THE TWELVE JUDGES. The indictment was for forgery; and the question was, Whether the following order was an order for the delivery of goods within the meaning of the statute of 7 Geo. II. c. 22.?

" SIR, *Monday*, 3 July 1775.

" PLEASE to let the bearer, *Captain George Williams*,

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" have twelve barrels of tar; and in so doing you will oblige

" *Your servant to command,*

" *To Mr.* GUILDMARE, " GOSPORT."

" WILLIAM ROBINSON."

MR. ROBINSON, whose name was forged, was a customer to Messrs. *Lys*, *Sketley*, and *Guildmare*, Merchants in *Gosport*; but it did not appear that he was the owner of, or had any special interest whatever in the twelve barrels of tar which the order was calculated to procure; or in any other goods whatever in their possession; or that he had any authority in any way to send a genuine order of such a kind.

See Rex, *v.* Clinch, *post.* January Session 1791.

THE JUDGES were unanimously of opinion, That this was not an order for the delivery of goods within the meaning of the statute. The case of *Mary Mitchell* (1), in MR. JUSTICE FOSTER'S Reports, they said, had been decided upon serious argument by a great majority of the JUDGES, and therefore the principles there laid down could not now be departed from; but most of them were of opinion, that the wording of this order was not by any means so strong as that in the case of *Mary Mitchell* (*a*); and that if it had been *res integra*, they should have thought it within the statute.

(1) Foster. 119.

(*a*) See Lockett's Case, Old Bailey, June Session 1772, *ante*, p. 94. Songer's Case, Old Bailey, May Session 1784. Clinch's Case, Old Bailey, January Session 1791.

THE KING *against* MARGARET CAROLINE RUDD.

CASE LXX.

EARLY in the month of March 1775, it was discovered that three bonds had been forged in the name of *William Adair*, Esq. of Pall-Mall. The first, dated in October 1774, conditioned for the payment of 3300*l.*; the second, dated in December 1774, conditioned for the payment of 5300*l.*; and a third, dated in January 1775, conditioned for the payment of 7500*l.* Suspicion fell upon a Mr. *Robert Perreau* of Golden-square, upon his brother Mr. *Daniel*

An accomplice who has been admitted by the Magistrate an evidence for the Crown, is not thereby exempted from prosecution; and it depends upon his making a full disclosure of the joint guilt of himself and his companions, whether the King's Bench will admit him to *bail*, that he may apply for a pardon.

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Perreau of Harley-street, and upon a Mrs. *Rudd*, who lived with *Daniel Perreau*. On the 15th and 17th March Mrs. *Rudd* made information before Sir *John Fielding* and two other Justices of the Peace, by which she confessed that she had signed the bond of 7500*l.* but that she had done it under very particular solicitations from *Robert Perreau;* and that he and *Daniel Perreau*, holding a penknife to her throat, had violently threatened her life in case she refused, by which mean she was forced to comply. The Magistrates, conceiving this to be a confession of her own guilt, admitted her, in the character of *an accomplice*, a general witness for the Crown as to *all* the forgeries; telling her, that if she would speak the truth, and the whole truth, not only in respect of the bond in question, but of *all other forgeries*, that then she should be safe: she denied however having any knowledge of, or concern in, any of the other bonds. On the 1st June 1775, *Robert Perreau* was convicted at the Old Bailey for uttering the bond of 7500*l.* knowing it to be forged, with intention to defraud Messrs. *Drummonds* the Bankers. On the ensuing day *Daniel Perreau* was convicted of knowingly uttering the bond of 3300*l.* with intention to defraud Dr. *Brooke*. It appeared upon *Robert Perreau*'s trial, from the evidence of Mr. *Drummond*, that Mrs. *Rudd* had confessed to him, that she was guilty of forging the bond of 7500*l.* and that *Robert Perreau* was innocent. Upon this information the Justices of Gaol Delivery issued a warrant against her, by virtue of which she was committed to Newgate, to answer all such matters and things as should be objected against her, touching the said felony and forgery. On the 7th June a detainer was lodged against her upon the oath of Sir *Thomas Frankland*, for forging the bond for 5300*l.* and on 3d July another detainer was lodged against her on the oath of *Robert Perreau*'s wife, for having forged the bond of 7500*l.* Under these circumstances she obtained a *Habeas Corpus* to the Court of King's Bench, with a view to be admitted to bail, and the above commitments were accordingly returned to the Court.

Trinity Term, 15 Geo. III.

WALLACE, LUCAS, and HOWARTH, shewed cause against admitting her to bail; and they contended, *First*, That

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Justices of the Peace have no power to admit an accomplice in forgery a witness for the Crown; forgery not being one of the offences mentioned in the statutes of 10 and 11 Will. III. c. 23. or 5 Ann. c. 31. *Secondly*, That supposing forgery were an offence within those statutes, yet the confession of the defendant had gone no further than to the bond of 7500*l.* and was silent as to the other two; and as she had not complied with the condition which the statute imposes, of making a full disclosure and discovery of all she knew, she was not intitled to any favour or protection in respect of the other two bonds.

DAVENPORT, for the defendant, contended, that as she had been admitted a witness for the Crown by the Justices of Peace, and had, under the faith and confidence of that admission, made a disclosure of the facts with which she was acquainted, it would be a breach of public faith to deprive her of the benefits she was thereby led to expect. He also urged that the circumstances of the defendant's health, were such as might in all probability endanger her life by the confinement, if she was remanded.

LORD MANSFIELD, C. J. It appears by the return to this writ, that the prisoner is detained in custody by two orders of the Court of Sessions and Gaol Delivery at the Old Bailey, for the forgery of two several bonds. It appears also, that she is further detained by a warrant from a Justice of Peace for uttering one of these bonds knowing it to be forged: therefore, though this Court has undoubtedly a discretionary power to bail in *all* cases *whatsoever*, yet as the Sessions are so near, and the offence committed by the prisoner is of such a magnitude as that of repeated forgery, there is no colour for the present application upon the ground of that general discretion. As to the next allegation, that her state of health is such as to be endangered by the confinement, it is not of *itself* a sufficient circumstance, in such a case, to induce the Court to interpose in her behalf. A third ground which has been urged in support of the present application is this; that the prisoner has been drawn in by promises and assurances to answer to an examination, and to swear to it

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on oath, which she would not have done, but from a confidence that those promises and assurances would have been kept and performed. The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial. But it has been urged, that the prisoner in this case is an *accomplice* who has been *admitted* as a witness to give *evidence*; that she has already given evidence; that she is further ready to give evidence to convict her partners in this business; and that she is therefore entitled by law to the King's pardon, and to a pardon which would operate in bar of her own crime. If she have such a right, we shall be bound *ex debito justitiæ* to bail her; if she have not such legal right, but yet come under circumstances sufficient to warrant the Court in saying that she has a title of recommendation to the King for a pardon, we should bail her for the purpose of giving her an opportunity of applying for such pardon. There are *three* ways in law and practice which give accomplices *a right to a pardon*; and there is *one* mode which entitles them to *a recommendation to the King's mercy*. The three legal ways are, FIRST, in the case of *approvement*, which still remains a part of the common law, though, by long discontinuance, the practice of admitting persons to be approvers is now grown into disuse (*a*): SECONDLY, the case of persons who come within the statutes 10 and 11 Will. III. c. 23. s. 5. and 5 Ann. c. 31. s. 4.: and THIRDLY, the case of persons to whom the King has, by special proclamation in the Gazette or otherwise, promised his pardon. Approvers have a right to a pardon; persons within the statutes of *King William* and *Queen Anne* have a right to a pardon; and the other class of offenders who come in under the royal faith and promise have a right to a pardon; and in all these cases the Court will bail them, in order to give them an opportunity of applying for a pardon. There is beside a *practice* which indeed does not give a legal right;

(*a*) See the Law respecting Approvers, Hawkins's Pleas Crown, book 2. ch. 24. 2 Hale's Pl. 229. 8 Inst. 129. Stamford's P. C. 142.

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and that is, where an accomplice having made a full and fair confession of the whole truth, is in consequence thereof admitted a witness for the Crown, and his evidence is afterwards made use of to convict the other offenders. If in that case he act fairly and openly, and discover the whole truth, though he is not entitled *of right* to a pardon, yet the *usage*, the lenity, and the practice of the Court is, to stop the prosecution against him; he having an equitable title to a recommendation for the King's mercy. The statutes of *William* and *Anne* are to be laid out of this case: FIRST, because they are confined to the discovery of particular offences only, of which *forgery* is not one (*a*): SECONDLY, because they relate only to persons who are at large; beside which, to entitle offenders to a pardon, they must actually *convict* two offenders at least; for if their confession be such on their trial as the Jury give no credit to, they are liable to prosecution. These statutes are therefore quite foreign to the present case; as are likewise all promises of pardon from the Crown by proclamation. There remains, therefore, only the equitable practice which gives a title of recommendation to the mercy of the Crown. The LAW of APPROVEMENT (in analogy to which this other practice has been adopted, and so modelled as to be received with more latitude) is still in force, and is very material. A person desiring to be an approver, must be one *indicted* of the offence, and *in custody* on that indictment: He must confess himself *guilty* of the offence, and *desire* to accuse his accomplices: He must likewise upon oath discover not only the particular offence for which he is indicted, but *all treasons* and *felonies* which he *knows of:* and after all this, it is in the discretion of the Court, whether they will assign him a Coroner, and admit him to be an approver or not; for if on his confession it appears that he is a *principal*,

2 Hawk. 94. Fitz. Cor. 50, 251, 441.

(*a*) By 10 and 11 Will. III. c. 23. against privately stealing in a shop, an offender discovering two or more accomplices is entitled to a pardon; and by 5 Ann. c. 31. s. 4. burglars discovering two accomplices are entitled to pardon.

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10 Co. 76.

and tempted the others, the Court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true; and that he has discovered the *whole truth*. For this purpose, the Coroner puts his appeal into form; and when the prisoner returns into Court, he must repeat his appeal without any help from the Court, or from any by-stander. And the law is so nice, that if he *vary* in a *single circumstance*, the whole falls to the ground, and he is condemned to be hanged: if he *fail* in the *colour* of a *horse*, or in circumstances of time, so rigorous is the law, that he is condemned to be hanged; much more if he fail in essentials. The same consequences follow, if he do not discover the *whole truth*: and in all these cases the approver is convicted on his own confession: this doctrine is to be seen more at large in *Hale's Pleas of the Crown, vol. 2. page 226 to 236. Staundf. Pl. Cr. lib. 2. c. 52 to c. 58. 3 Inst.* 129.—A further rigorous circumstance is, that it is necessary to the approver's own safety that the Jury should believe him; for if the partners in his crime be not convicted, the approver himself is executed. Great inconvenience arose out of this practice of approvement; and there is no doubt, if it were not absolutely necessary for the execution of the law against notorious offenders that accomplices should be received as witnesses, the practice is liable to many objections. And though, under this practice, accomplices are clearly competent witnesses (*a*), their single testimony alone is seldom of sufficient weight with a Jury to convict the offender; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself. Let us see then what has come in the room of this practice of APPROVEMENT: it is a kind of *hope*, that accomplices who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy.

(*a*) It has been long settled that it is no exception against a witness that he has confessed himself guilty of the same crime. See Hawk. P. C. book 2. c. 46. Rex *v.* Atwood, *post.*

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But no authority is given to a Justice of the Peace to pardon an offender, and to tell him that he shall be a witness against others. The accomplice is not assured of his pardon; but gives his evidence *in vinculis*, in custody: and it depends on the title he has from his behaviour, whether he shall be pardoned or executed. A Justice has no authority to select whom he pleases to pardon or prosecute, and the prosecutor himself has even a less power or rather pretence to select than the Justice of Peace. It rests therefore on *usage*, and on the offender's own good behaviour, whether he shall be prosecuted or not. And if, in a proper case, an application be made to this Court by an accomplice to be bailed; that is, in the case of a person properly within the usage, and who has fully complied with the requisite conditions, I should have no difficulty in bailing him, in order that he might apply for the King's pardon. I am apprised of the case of an accomplice upon a trial before MR. JUSTICE GOULD, the circumstances of which were as follow: An accomplice made a fair and full discovery to the satisfaction of MR. JUSTICE GOULD, who tried the other offenders. The other witnesses who were called upon the trial, proved the identity of the accomplice by the description of his person, but failed as to the identity of the other offenders; and the Jury, because they doubted of the guilt of the others, acquitted them. The Counsel on the part of the prosecution then contended, that the accomplice ought to be tried; but MR. JUSTICE GOULD, under the circumstances of the case, was of a contrary opinion, and, I think, very rightly. These being the general rules, let us see how far the present case is applicable to them, or in any degree falls within the reason of them. A bond is detected to have been forged: three persons are apprehended on suspicion, the two *Perreaus* and the prisoner. The Justices by their affidavit say, they admitted the prisoner as a witness against the *Perreaus*, and swear that they considered her as an accomplice: and they say they told her, "that if she would speak the truth, and "the *whole truth*, not only in respect of the bond in ques- "tion, but of *all the other forgeries*, that then she should "be *safe*; if *not*, she should be prosecuted." And the truth

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is, that in point of law, she was liable to be prosecuted for all. What is the disclosure she makes? It is this: "That "*Daniel Perreau* came with a knife to her throat, and threat- "ened to kill her if she did not forge *one* of the bonds in "question; that under the terror of death she forged it; "and that *Robert Perreau* brought the bond before ready "filled up." On this information she is no accomplice; she has confessed no guilt, if the fact be true that she was under the fear of immediate death; for it is the will that makes the action criminal. She comes therefore in the character of a person injured; in the character of one to whom this violence has been done. Instead of being a party *offending*, she is a party *offended*, as much as a man who has been robbed on the highway.—Further, the Justices do not treat her as an accomplice; for they ought to have kept her in custody if she had been an accomplice; but they discharged her, and they did right, there being no charge against her. But still they say in their affidavit, that they did consider her as an accomplice. Suppose they did really think her guilty, she is not the more or less on that account an accomplice. But what is most material is, that her information is flatly contradicted by herself; for on a voluntary confession of her own, she took the whole guilt upon herself; said that she alone forged the bond for 7500*l.* and that *Robert Perreau* was an innocent man. If the Justices had known of this confession, they could not have admitted her as an evidence; because by that confession she makes herself not only a *principal*, but the *only* person guilty. One of the bonds for which she is now detained, is dated three months prior to the bond in which *Robert Perreau* was concerned. On this bond she is totally silent, and denies any knowledge of the other two. Her information is therefore false, and the conditions offered to her by the Justices not complied with. I agree with Mr. *Davenport*, that if she had made a fair and full disclosure of all that she knew, and the Justices had deceived her, under a promise or assurance or hope of a pardon from them, she would be entitled to a recommendation to mercy: and in that case I should have been of opinion to

bail her, though the Justices had in strictness no right to make such a promise, or give her such assurance. If any evidence or confession has been extorted from her, it will be of no prejudice to her on the trial.

THE THREE OTHER JUDGES concurred; and Mrs. *Rudd* was accordingly remanded.

AT the Old Bailey in September Session 1775, Mrs. *Rudd* was put to the bar, on an indictment for forging the bond of 5300*l.* But Mr. *Davenport* and Mr. *Cowper* contended, that having been admitted as a witness for the Crown, she ought not to be put upon her trial. Mr. *Bearcroft*, Mr. *Lucas*, and Mr. *Howarth*, submitted to the Court, that the condition upon which she was admitted a witness was, That she should discover *all* the forgeries of which the *Perreaus* and herself had been guilty, but that she had knowingly suppressed that for which she was at present indicted. The Judges (1) differing in their opinions upon this subject, Mrs. *Rudd* was remanded, and the question submitted to the consideration of THE TWELVE JUDGES.

(1) Mr. Justice Gould, Mr. Justice Ashhurst, Mr. Baron Hotham.

MRS. RUDD was again put to the bar on the first day of December Session following, and MR. JUSTICE ASTON delivered the opinion as follows:

MARGARET CAROLINE RUDD, At the last September Session, upon your being brought to the bar to plead to several indictments found against you for forgery, it was insisted upon by your Counsel, that in point of law you ought not to have been put upon your trial at all, as you had confessed yourself to be an accomplice before the Justices of Peace for the county of Middlesex, and had been by them admitted as a witness for the Crown against your companions in guilt *Robert* and *Daniel Perreau*. The ground of that claim was founded upon the supposed merit of the discovery you had made: that being admitted to give evidence as an accomplice, and having performed your engagement to the public, by being examined before the Grand Jury, and being ready to have given evidence upon the trial, if called upon, you were

1775. entitled to pardon, or not to have been prosecuted, that you might have time to apply elsewhere: that the constant practice in regard to accomplices becoming the King's evidence was, That they should not be prosecuted for the offence they had confessed, or such like offences: that a contrary conduct would be a breach of faith with you, and would discourage the future discovery of criminals, if after such disclosures they were nevertheless to undergo prosecutions for their offences. To this it was answered, That the discovery meant by law or practice to entitle an accomplice to favour, must be a full, ample, and true discovery; and that it would never discourage the making such discoveries, if criminals offering themselves as witnesses were made to understand, that to entitle themselves to mercy or favour, they are to make a full discovery of all the offences about which they were questioned, and of all their accomplices in guilt. And it was farther insisted, that you had not made a fair disclosure, at the time of your examination, of all you knew relative to the forgeries which had been committed and published, but that you stood charged by the Grand Jury with several other forgeries which you had denied the knowledge of. Upon the debate of this matter before the Bench of Gaol Delivery, the Judges present not all concurring in one opinion, and it being judged a point of great weight and importance in the criminal law, fit to be fully considered and finally settled, how far, under what circumstances, and in what manner, an accomplice, received as a witness, ought to be intitled to favour and mercy; the farther consideration of the matter was then deferred, in order that the opinion of all the Judges might be taken upon the point of law.

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Eleven of the Judges have accordingly met, the Lord Chief Justice of the Common Pleas being absent through indisposition, and have maturely and deliberately considered of the matter, under all the circumstances; and it falls to my share to deliver, in your presence, to the public, the substance of their reasons upon the occasion, that the ground of their resolves may be rightly understood. All the Judges

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were of opinion, that in cases not within any statute, an accomplice who fully and truly discloses the joint guilt of himself and of his companions, and truly answers all questions that are put to him, and is admitted by Justices of the Peace as a witness against his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumstances of the case to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be prosecuted for his own guilt so disclosed by him, nor perhaps for any other offence of the same kind, which he may accidentally, and without any bad design, have omitted in his confession; but he cannot by law plead this in bar to any indictment against him, nor avail himself of it upon his trial; for it is merely an equitable claim to the mercy of the Crown, from the Magistrates' express or implied promise of an indemnity, upon certain conditions that have been performed; it can only come before the Court by way of application to put off the trial, in order to give the prisoner time to apply elsewhere. Nine of the eleven Judges were of opinion, That all the circumstances relative to a prisoner's claim of indemnity in such a case, not only may, but *ought* to be laid before the Court, to enable them to exercise their discretion, whether, upon the grounds before them, the trial should be put off, and consequently have intimation given that the prisoner ought not to be prosecuted; for the discretionary power exercised by the Justices of the Peace in admitting accomplices to be witnesses, founded in practice only, cannot controul the authority of the Court of Gaol Delivery, and exempt at all events the accomplice from being prosecuted. Upon every motion made, upon collateral equitable grounds, the Court will see and examine into the whole truth, and consequently ought to be informed of all the circumstances affecting the case. The affidavit of the Justices, therefore, must in this case be necessarily taken into consideration, to see upon what ground they admitted the prisoner as a witness. For if the Court looked no further than the prisoner's own information, in the present case, they could not have learned from thence

1775. that she had ever been considered as an accomplice at all; or that as such she had been admitted as a witness against the *Perreaus*, in either of the prosecutions. Upon their affidavit it appears that the public faith was only engaged conditionally, and that there was an express admonition given to the prisoner, not to conceal any part of the truth.

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THE same nine Judges also were of opinion, that if the matter stood singly upon the two informations of the prisoner, compared with the indictments against her, she ought to have been tried upon all or any of them; for from the prisoner's information, she is no accomplice; she has not confessed herself guilty of any offence at all. By her representation the share she has had in these transactions is perfectly innocent; but she exhibits a charge against *Robert* and *Daniel Perreau*, the one soliciting her to imitate the hand of *William Adair*, from a paper he produced; the other forcing her to do the fact of forgery, under the threat and fear of death. Her two informations are contradictory, and every indictment that is preferred against her proceeds upon a falsification of the account she has given; for she answers to the Justice's interrogation, that she did not know of any other forgeries; so she does not confess, make any discovery, or become a witness concerning these offences; and if she has suppressed the truth, and not made a full and fair disclosure, she forfeits all equitable claim to favour and mercy. But if she has *told the truth, and the whole truth*, she cannot be convicted. On the other hand, taking the affidavit of the Justices and all the case into consideration, if she is guilty of the charge contained in the indictments preferred by Sir *Thomas Frankland*, the Judges are of opinion, as her informations before the Justices have no relation to these charges, they can in no light be applied to mitigate her offences.

UPON the whole, whether the prisoner be guilty or not guilty, is a fact still to be tried by a Jury upon legal evidence only, without prejudice to the prisoner from any thing which has been insisted upon in point of law by her Coun-

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sel to exempt her from any trial at all; for it would be hard indeed upon the subject, who has a right to advice and assistance of Counsel in all matters and points of law that may arise upon his case, if the eventual decision of the Court against the points of law insisted upon in his behalf should prejudice the subsequent trial of the facts, which is ultimately to be governed by the rules of evidence, and to be decided by the verdict of the Jury. I hope and trust, the facts will be tried without the least attention to, or even a remembrance of, any one matter or thing whatever, which has either made its appearance in print, or been the subject of common conversation. I shall only add, that an accomplice, who desires his trial may be put off that he may apply for mercy, under all the most regular pretensions before laid down, confesses the guilt; but, under the circumstances of this case, if the prisoner confess these indictments, she has no promise of mercy, and no claim to favour, for the reasons aforesaid. The JUDGES therefore are of opinion, That the trial ought to proceed; and I have authority to say, that the Lord Chief Justice of the Common Pleas concurs in that opinion.

IN consequence of this determination, Mrs. *Rudd* was tried by MR. JUSTICE ASTON, present MR. BARON BURLAND, and MR. SERJEANT GLYNN, Recorder, for forging a certain paper writing purporting to be a bond signed, sealed, and delivered by *William Adair, Esq.* in the penal sum of 10,600*l.* conditioned for the payment of 5300*l.* with lawful interest to *Robert Perreau*, on the 23d March 1775, with an intention to defraud, 1st, *William Adair*, 2d, Sir *Thomas Frankland*, Baronet. There were also other counts for uttering it with the like intention.

To give evidence against a prisoner, under a hope that the conviction of such prisoner will tend to procure the pardon of a the witness.

THE first witness produced at the trial of Mrs. *Rudd* on the part of the prosecution was *Henrietta Alice Perreau*, the wife of *Robert Perreau*, who was then under sentence of death for having knowingly uttered the bond of 7500*l.* Mr. Serjeant *Davy*, the prisoner's Counsel, asked her, "Is it "not your opinion, that the fate of your husband will de-

husband convict, goes to the *credit* and not to the *competency* of

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" pend on the conviction of Mrs. *Rudd?*" To which Mrs. *Perreau* answered, " I am not clear of that." He then asked, " Do you not hope, or expect, that the conviction of " Mrs. *Rudd* will be a means of obtaining your husband's " pardon?" To which Mrs. *Perreau* answered, " I have " nothing but the truth to say." On being pressed to answer the question directly, she said, " I don't hope for the " conviction of Mrs. *Rudd.* I hope Mr. *Perreau's* innocence will clearly appear." She was then asked, " Whether she did not apprehend that Mrs. *Rudd's* conviction " would contribute to procure her husband's pardon?" To which she answered, " If Mrs. *Rudd* is found guilty, I suppose it will. I hope it may be the means of procuring " Mr. *Perreau's* pardon."

Mr. Serjeant Davy submitted to the Court that Mrs. *Perreau* was not a competent witness, after having told the Court she *hoped* the conviction of Mrs. *Rudd* might be the means of obtaining her husband's pardon: that nothing was more clear than that no person can be a witness in any civil action or criminal prosecution, who is interested in the event of the suit; and so cautious is the law respecting the competency of witnesses, that a person whose bond or note is forged shall not be admitted as a witness to prove it a forged instrument, if in consequence of his testimony the validity of the instrument may be in any way affected or impeached by the conviction of the party; that if *Robert Perreau* was a co-defendant in the present indictment with Mrs. *Rudd*, it would be clear that Mrs. *Perreau* could not be admitted to give her testimony; for no wife can give evidence for or against either her husband or the co-defendant of her husband.

Mr. Thomas Cowper, on the same side, observed that the law requires that every witness should be totally indifferent as to the event of the cause; that when a witness only conceives himself to be interested in the event of a prosecution, however mistaken he may be upon the subject, his mere imagination of being interested is as much an objection to his competency as if he had been really interested

therein; for the wisdom of the law anxiously endeavours to exclude every witness who has the least bias on his mind, from whatsoever source that bias may spring; and to render a witness superior to all objection, he must be totally indifferent upon the subject on which he is about to be examined, and altogether disinterested in the event of the prosecution. The bias that may be upon the mind of a wife in favour of her husband, or a husband in favour of a wife, is undoubtedly the strongest that the law can take notice of; and for Mrs. *Perreau* not to have that bias, not to be warped by the ties of conjugal affection, not to come with more anxious wishes on the one side than on the other, would, under the present circumstances, be almost criminal. Whether her imagination that the conviction of Mrs. *Rudd* will contribute to obtain her husband's pardon be well or ill founded, will not alter the case an iota: she has said that it is her opinion, that her husband's innocence will appear in consequence of Mrs. *Rudd*'s conviction, and that she hopes his pardon will follow that conviction. It is then through the medium of Mrs. *Perreau*'s testimony, which is to contribute to the conviction of Mrs. *Rudd*, that her husband's life is to be saved; and if that be not a clear, a decisive, and a positive interest, it is impossible to define what a positive interest is. If upon the trial, when it was an equal chance, whether he would or would not be in the unfortunate predicament of being under sentence of death, his wife could not be admitted a witness for him; is he, when under sentence of death, to be rescued from that unfortunate situation by her testimony? Does the influence cease, and does it become an objection to her *credit* only, and not to her competency? In civil cases, if an objection be taken to a witness who only imagines that he has an interest, though he has none, such objection is invariably allowed to prevail. If a master, for instance, in defending his servant, imagine that in point of honour he ought to pay his costs, though there be no bond to indemnify him, but he says, I think as a man of generosity, in point of honour, I ought not to let my servant suffer, no bias can well be smaller; and yet in such case the

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testimony of the master would be rejected. The very sentiment proves him deserving of credit; for it arises from a high sense of honour and moral obligation, and it cannot be imagined that such a man would tell an untruth; and yet so careful is the law to avoid the possibility of falsehood, that the testimony of even such a man cannot, under such circumstances, be legally received. A case happened yesterday (5 December 1775) in the Court of King's Bench, upon a trial respecting a patent. The patentee produced his journeyman, who stated to the Court, that he had entered into articles to work a number of years for the patentee, and receive a sum of money upon the patent; an objection was made to his testimony; and on *a release* of the articles being executed by the witness in Court, it was contended that the objection was removed; but a question was put to him, Whether, although he had discharged his master from all the obligations he was under to him, he did not expect, when he went out of Court, to be restored to the situation he was in before; and he replied, "*Why, I believe "my master is an honest man, and that he could not do the "work without me, and therefore I am well convinced I shall "be put into the situation from which I have released my-"self;*" and LORD MANSFIELD, upon the idea that the witness's imagination led him to suppose that he should certainly be restored to his former situation, rejected his testimony, and would not suffer him to endanger his veracity by being examined on the trial, repeating what he had once before said in delivering a solemn judgment from the Bench, that "It is not the office of Courts of Law to consider how "far the minds of men may be capable of resisting tempta-"tion, but to take the most anxious care that they shall not "be exposed to any temptation at all."

MR. LUCAS, for the Crown. The observations that have been made by the Counsel for the prisoner are calculated rather to shew the degree of *credit* to which Mrs. *Perreau* may be intitled from the Jury, than to destroy her *competency* in the judgment of the Court. If the doctrine of incompetency were suffered to prevail to the extent now contended

for, it would be almost impossible to convict any prisoner, whatever might be his crime, or however certain his guilt. Suppose the prosecutor, in a case of robbery or larceny of any kind, were asked, "Do you not, Sir, if the prisoner "should be convicted, expect the restoration of your pro- "perty?" and he were to answer, as it is most likely he would do, "Yes, I do expect to have my property again," he would, if the argument on the other side were to prevail, be thereby rendered an incompetent witness; but was ever such a question suffered to be answered for such a purpose? In cases where the prosecutor is intitled to a reward, the reward is dependent on the conviction; and therefore a prosecutor is in such case interested in the conviction of the prisoner; but it is a decided point, that no objection can be made to his competency on that ground; and indeed the daily practice of examining such a witness shews that it cannot be taken. An accomplice is not sure of his pardon in many cases, notwithstanding he has given his evidence fairly and fully against the companions of his guilt; it is only from the favour of the Crown that he can hope to receive it; but hope it he must, and yet such accomplices are considered as competent witnesses for the Crown. Suppose in a case where a statute gives a pardon to an accomplice if he convicts *two persons* of the offence therein described, and he only gives evidence against *one person*, or even against two persons and neither of them are convicted, he is not intitled to his pardon as a matter of right, because he has not performed the condition on which it was promised him; but having done upon such an occasion all that truth and justice enabled him under the circumstances of the case to perform, he may entertain a rational and well-founded hope of being pardoned; but this hope has never been held to preclude him from being a witness. So though Mrs. *Perreau* hopes that her husband will be pardoned, whether Mrs. *Rudd* be or be not convicted, it is only through the favour of the Crown that he can receive that mercy, and therefore the interest she may feel in giving her testimony is not that direct and immediate interest which must exist

1775. and clearly appear before the competency of a witness can be destroyed.

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THE COURT. The reason assigned by Mrs. *Perreau* for her hope that the conviction of the prisoner might tend to procure her husband's pardon appears to be substantially founded on an idea that such facts may appear in evidence on the trial as will shew that her husband is innocent, and induce the Crown to extend its mercy to him. She apprehends that Mrs. *Rudd*'s guilt will be manifested; but it does not follow that, if the Jury should be of opinion that Mrs. *Rudd* is guilty of the present charge, *Robert Perreau* must be innocent of the charge of which he has been convicted, or that her conviction will so soften the complexion of his guilt, as necessarily to induce the Crown to pardon him; and therefore the hope she has expressed is not sufficient to render her an incompetent witness; for the bond, for the uttering of which *Robert Perreau* was convicted, is not the same bond for the forging of which Mrs. *Rudd* is now to be tried. The observation that if *Robert Perreau* were a co-defendant with the prisoner, Mrs. *Perreau*'s evidence would be inadmissible, is certainly well founded; for a wife cannot directly or indirectly give evidence either for or against her husband; but it does not apply to the present case. The cases put by Mr. *Lucas* are very apposite to the present case. The accomplice hopes for a merciful interference of the Crown in his favour; but he is not intitled to it, nor does it necessarily follow from his disclosing the guilt of his companions; for he may, notwithstanding such disclosure, be indicted and convicted. In prosecutions where there are rewards, although the reward can only be the effect of the conviction, the prosecutors are competent witnesses; yet every man that comes as a witness under the idea of having a reward on the conviction of the prisoner may be said to be interested in point of property in the event of the cause. So the case of criminals admitted witnesses under the statutes of *King William* and *Queen Anne* are clearly within the objection now made, because they are not intitled to pardon unless their evidence is a means of conviction; and therefore where the legislature

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has held out that as a reward, by way of inducement for criminals to convict and make a discovery, it would have been acting against the rules and principles of law, if in consequence they were, by giving their testimony, considered as interested in the event of the prosecution. They are in the same situation, in appearance, who, although they do not convict, are intitled to a pardon. But the case that has been put of a prosecutor declaring that he hoped by the conviction of the prisoner to obtain restitution of his property, is precisely parallel to, and decisive of, the present point. Whatever therefore Mrs. *Perreau*'s hopes may be, yet as the satisfying of them does not necessarily follow upon the conviction of Mrs. *Rudd*, the Court is of opinion that she cannot be considered as interested in the event of the prosecution so as to exclude her from giving her testimony therein; for that although the objection goes very strongly to affect her *credit*, of which the prisoner will have all advantage, it leaves her *competency* undestroyed.

AFTER a very long trial the Jury brought in their verdict, "*According to the evidence before us*, NOT GUILTY."

DANIEL PERREAU and ROBERT PERREAU were executed at Tyburn on Wednesday 17th January 1776.

THE KING *against* BEECH.

CASE LXXI.

IN the King's Bench, Michaelmas Term 15 Geo. III. the defendant had been convicted of perjury in an affidavit; and a rule had been obtained to shew cause why the judgment should not be arrested.

The word *undertood* instead of *understood*, held an immaterial variance in an indictment of perjury.

MR. BULLER and MR. DUNNING, in support of the rule, relied upon a variance between the indictment and the affidavit. In the affidavit the defendant swore, that "he *understood* and believed," &c. The assignment of the perjury in the indictment was, that "he had falsely sworn that "he *undertood* and believed," &c. omitting the letter *s*; and they insisted that this being a variance in the material part

Cowper, 229. Douglas, 194. 1 Term Rep. 237.

1775. of the charge, *viz.* in the assignment of the perjury itself, was fatal and could not be cured by verdict, and cited 2 *Salk.* 660. *Hutton*, 56. *Cro. Jac.* 133. 5 *Co.* 45. *Ld. Raym.* 1224.

BEECH'S CASE.

LORD MANSFIELD, C. J. This is an application for a new trial in an indictment for perjury, upon the ground of a material variance between the affidavit and the indictment; the letter *s* being left out in the word *understood*. We have looked into all the cases on the subject; some of which go to a great degree of nicety indeed, particularly the case in *Hutton*, where the word *indicari* was written for *indictari*; but that case is shaken by the doctrine laid down in 2 *Hawkins*, *P. C. p.* 239. The true distinction seems to be taken in the case of *The Queen* v. *Drake*, 2 *Salk.* 660. which is this: That where the omission or addition of a letter does not change the word, so as to make it another word (1), the variance is not material. To be sure, a greater strictness is required in criminal prosecutions than in civil cases; and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a case where the matter has been fairly tried, and where the omission of the letter *s* certainly does not change the word. Therefore we are all of opinion, That the Jury did very right in reading it "*understood*," and the rule for arresting the judgment must be discharged.

(1) As "*air*" for "*heir*." And see Hart's Case, Worcester Assizes 1776, *post*.

Douglas, 194. NOTE, The introductory words in the indictment in this case were, "*to the* TENOR *and* EFFECT *following*."

CASE LXXII. THE KING *against* CAPTAIN ROCHE.

The Jury cannot be charged at the same time to try the two issues of *Autrefois acquit* and *Not guilty*. See 33 Hen. VIII. c. 23. and 43 Geo. III. c. 113. s. 6.

AT the Old Bailey December Session 1775, *David Roche* was tried before MR. BARON BURLAND, on a special commission, present MR. JUSTICE ASTON, and MR. SERJEANT GLYNN, Recorder, for the wilful murder of *John Ferguson*, at the Cape of Good Hope, on the coast of Africa.

To this indictment *Captain Roche* pleaded *Autrefois acquit* before OLAFF MARTINI BERG, provincial Fiscal of the supreme Court of Criminal Jurisprudence there.

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MR. SERJEANT DAVY for the prosecution moved, that the Jury might be charged at once with this issue, and that of *Not guilty*.

THE COURT. In pleas in abatement there are two issues, and they are always tried upon separate charges to the Jury. Besides, charging them with both issues at once would lead to this absurdity, that being charged with both, they would be obliged to find upon both: and yet if the first finding was for the prisoner, they could not go to the second, because that finding would be *a bar* (*a*). They are distinct issues, and the Jury must be separately charged with them.

2 Hawk. P. C. c. 35, *passim*, and p. 276, 283, 563. Hobart, 270. 1 Bulst. 141. Yelv. 204. Cro. Jac. 283. 4 Co. 45. Staund. 82. Cro. Eliz. 495. Moor, 457.

THE Counsel for the prosecution was therefore ordered to put in a replication; but the prisoner withdrew the plea in bar, and the case was tried on the general issue.

THE prisoner was acquitted.

(*a*) It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction: therefore if A., having killed a person in *Spain*, were there prosecuted, tried and acquitted, and afterward were indicted here, at Common Law, he might plead the acquittal in *Spain* in bar. Bull. N. P. 245, as in the case of Mr. *Hutchinson*, who had killed Mr. *Colson* in *Portugal*, and was acquitted there of the murder: and being afterwards apprehended in *England* for the same fact, and committed to *Newgate*, he was brought into the Court of King's Bench by *Habeas Corpus*, where he produced an exemplification of the Record of his acquittal in *Portugal*; but the King being very willing to have him tried here for the same offence, it was referred to the consideration of the Judges, who all agreed, that as he had been already acquitted of the charge by the law of *Portugal*, he could not be tried again for it in *England*. See Beak *v.* Thyrwhit, 2 Mod. 194. S. C. 1 Show. 6. And the statute 33 Hen. VIII. c. 23.

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CASE LXXIII.

THE KING *against* HARRIS AND MINION.

What evidence is necessary to support an indictment for *High Treason* on 5 & 9 Will. III. c. 26. s. 4. 1 East, 164.

THE JUDGES met at Serjeants'-Inn Hall on the first day of Hilary Term 1776, to consider the following case, which had been reserved by MR. JUSTICE ASHHURST at the Old Bailey during the then next preceding session.

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HARRIS AND MINION'S CASE.

THE first count of the indictment on 25 Edw. III. c. 2. stated that *Joseph Harris*, &c. *Thomas Minion*, &c. and *Charles Hall*, on the 15 December 1775, one piece of money of this realm called a shilling, falsely, deceitfully, feloniously and traiterously did forge and counterfeit against the duty of their allegiance, against the peace, &c. and against the form of the statute, &c. There was a second count on the 8 & 9 Will. III. c. 26. s. 4. which charged that they one piece of false, feigned and counterfeit money and coin, to the likeness and similitude of the good, legal, and current money and silver coin of this realm called a shilling, did falsely and deceitfully, feloniously and traiterously forge, counterfeit and coin against the duty of their allegiance, and against the statute.

To support these charges the following facts were given in evidence. At the time the prisoners were apprehended *Minion* was sitting by the fire-side. *Harris* had a pair of scissars and some metal in his hand, which he was clipping into slips of more than an inch broad. There was a crucible on the fire, and metal melting in it, a pair scales and weights, with some good silver lying by them. In a box, with the lid open, were the flasks and moulds, and several pieces of base metal which appeared to have been cast in the moulds, for the impression upon some of them exactly resembled that on one of the good shillings which was lying near them. In these pieces of base metal there is a small mixture of good silver, which, by heating them, and then immersing them in *aqua fortis* and water, is drawn out upon the surface of the metal. But no one piece of base metal at present found was in such a state as to make it passable; for to make such pieces of base metal completely resemble shillings, they must be rubbed, filed, and thrown into *aqua fortis*.

See the Case of Rex v. Dring, Old Bailey, Feb. Sess. 1790.

THE learned Judge said, that he thought the first count in this indictment was new and singular: and upon enquiry it appeared, that it had been now introduced for the first time; and that in two instances which had lately happened, where the indictment consisted of one count only, similar to the second count in the present indictment, the Jury, upon

evidence like the present, had been directed to acquit the prisoners. Upon the authority of these two determinations his Lordship told the Jury, that in his idea the different formation of the indictment could not vary the nature of the offence, and therefore they ought to find their verdict *Not Guilty*. The Jury, however, found the prisoners *Guilty* on the first count, and acquitted them on the second. 1776. HARRIS AND MINION'S CASE.

THE QUESTION submitted to the JUDGES was, Whether, under these circumstances, the conviction was proper? and on the first day of Hilary Term 1776, they were unanimously of opinion, that it was not. See Denton's Case, June Sess. 1789.

THE KING *against* STEPHEN SELF. CASE LXXIV.

AT the Old Bailey in February Session 1776, *Stephen Self* was tried before MR. SERJEANT GLYNN, Recorder, for the wilful murder of *William Kingrose*, his apprentice, by means of famine and harsh treatment.

If a master, by premeditated negligence or harsh usage, cause the death of his apprentice, it is murder.
S. C. 1 East, 226.
Co. Lit. 295.
3 Inst. 48, 91.
1 Hale, 425, 432.
Palmer, 548.
9 St. Tr. 146 to 251.
Pullen, 122.
Cromp. 24, 90.
1 Hawk. P. C. 118, 9. Co. 81.
Staund. 17.
Ld. Ray. 143.
Stra. 856, 884.

THE *final cause* of the death of the deceased was a mortification in his legs, the seeds of which had originated from the impoverished state of his blood, occasioned by a long confinement on bread and water in Bridewell. There was strong evidence, however, that neglected chilblains, and a series of very rigorous and cruel usage, which he had for a long time endured from his master, had been the *efficient cause* of his decease.

IT was therefore left to the Jury to consider from which of these two causes the death proceeded; with an observation, that if they thought it had proceeded from the passive negligence or active severity of his master, subsequent to his confinement in Bridewell, the law would imply malice, and the offence would be murder (*a*).

(*a*) See the trial of *William Wade* for the murder of *Constance Frost*, his apprentice, for refusing to allow and give, or to permit and suffer to be allowed and given, sufficient food, drink and necessaries to support life, Old Bailey, February Session 1784; and Patmore's Case, Old Bailey, February Session 1789.

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THE JURY, feeling the atrociousness of the prisoner's conduct, but doubting whether it had been the cause of death, found him guilty of manslaughter. THE RECORDER hesitated a short time as to the propriety of this verdict; but *in favorem vitæ* it was at length recorded, and the case referred, by the concurrence of MR. JUSTICE GOULD and MR. BARON HOTHAM, to the consideration of the JUDGES.

This does not accord with Mr. Justice Gould's account of it (*a*).

THE JUDGES were clearly of opinion that there was no ground for the verdict, for that it was either murder, or no offence at all; but as the Jury had thought proper to find it manslaughter, they would not meddle with it; and the prisoner was accordingly burnt in the hand and discharged.

(*a*) MR. JUSTICE GOULD'S note of this case is that the prisoner upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required; and which he might have done; the apprentice not having been suffered to be in a bed on account of the vermin, but being made to lie on the boards, without covering and without common medical care; that the medical persons who were examined in this case were of opinion that the boy's death was most probably occasioned by his ill treatment in Bridewell, and the want of care when he went home; and they inclined to think that if he had been properly treated when he came home he might have recovered; that though some harsh expressions were proved to have been spoken by the prisoner to the boy, yet there was no evidence of any personal violence having been used by the prisoner; and it was proved that the apprentice had had sufficient sustenance; that the prisoner had a general good character for treating his apprentices with humanity; and that he had made application to get this boy into the hospital: That under these circumstances THE RECORDER left it to the Jury to consider whether his death was occasioned by the ill treatment he received from his master after returning from Bridewell; and whether that ill treatment amounted to evidence of malice; in which case they were to find him guilty of *murder*; telling them at the same time, with the concurrence of GOULD J. and HOTHAM B. that if they thought otherwise, yet as it appeared that the prisoner's conduct towards his apprentice was highly blameable and improper, they might under all these circumstances find him guilty of *Manslaughter*; which they did; and that upon the question being afterwards put to THE JUDGES whether the verdict was well found, they all agreed that the prisoner should be burnt in the hand and discharged. S. C. 1 East, 227.

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THE KING *against* THOMAS JONES. CASE LXXV.

AT the Old Bailey in February Session 1776, *Thomas Jones*, otherwise *Evans*, was indicted for a highway robbery.

The crime of *robbery* may be committed by obtaining money from a man by threatening to charge him with having been guilty of sodomitical practices. See Donally's Case, *post*. Hickman's Case, *post*.

THE prosecutor, *Mitchel Newman*, who, from the evidence of several witnesses, bore an extraordinary good character, and who was totally unacquainted with the prisoner, went on the 29th September 1775, to the upper gallery of Covent-garden Play-house: The crowd was great, and in his eagerness to get a good seat, the prosecutor's hand, as he pressed before the prisoner, touched the prisoner's breeches. The prisoner followed *Newman* to several parts of the gallery, and took his seat by him. During the play, a young man who sat on the other side of *Newman*, asked him what it was o'clock? and soon afterwards the prisoner enquired whether the young man was of his company? to which *Newman* replied that he was not; and this was all the conversation that passed between them during the play. The prisoner followed *Newman* out of the house, and as they were crossing *Bow-street*, said to him, "Won't you have some-"thing to drink after the heat?" to which the prosecutor assenting, they went together into a public-house in *Bow-street*, and called for a pot of porter: The prosecutor drank the prisoner's health, and then gave him the pot, which he took, saying, "I thank you;" and having drank what remained in it to the prosecutor's health, immediately turned towards him with a kind of grin, and asked him what he meant by the liberties he had taken with his person in the play-house? The prosecutor replied, that he knew of no liberties being taken; upon which the prisoner replied, "Damn you, Sir, but you did, and there were several re-"putable merchants in the house who will take their oaths "of it!" The prosecutor being surprised by, and greatly alarmed at this accusation, immediately arose from the seat, and paying for the porter, went out of the house, saying to the prisoner, "I do not know what you mean by all this!" The prisoner followed him out, and observing the street

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crowded, hallooed out, "Damn you, Sir, stop! for if you "offer to run, I will raise a mob about you," and seizing him violently by the arm, exclaimed, "Damn you, Sir! "this is not to be borne! you have offered an indignity to "me, and nothing can satisfy it!"—The prosecutor, terrified by these expressions, and the manner in which they were uttered, replied, "For God's sake, what do you want? What "would you have me do?"—"A present, a present—you "must make me a present," said the prisoner, moderating the tone of his voice. "A present of what?" said the prosecutor.—"Come, come," replied the prisoner, "what money "have you?—How much can you give me now?"—The prosecutor said, "I have but a little; but what I have got you "shall have;" and he accordingly gave him three guineas and twelve shillings. The prisoner, as he took it, asked him whether it was all he had? and on being answered in the affirmative, said, "Damn it, Sir, this is not enough—I must "have a further sum." The prisoner, during the whole of this conversation, held the prosecutor fast by the arm, and thereby defeated the several efforts he made to get away; but at length the prisoner suffered him to walk on, he still accompanying him, and keeping tight hold of his arm, and which the prosecutor swore put him into great fear for the safety of his person. In this manner they walked down *Russel-street*, into *Bridges-street*, when the prisoner said, "I "believe I know you, Sir; I have some friends at a coffee-"house at the bottom of the street; if you will go with me "there we will then settle this business." The prosecutor refused to go, and denied to his face that he had ever seen him before, upon which the prisoner gave his arm a twist, and let him go. The prosecutor, however, had not run far before the prisoner ran after him, and overtaking him just as he got into *Queen-street*, asked him if he would meet him the next day at a coffee-house near Temple-bar? and on his refusing so to do, insisted upon knowing his name, and where he lived; but on the prosecutor refusing to comply, he swore that he would know, and actually followed him to the door of his lodgings, where he called early the ensuing morning,

and frightened him out of a further sum of forty pounds, which was all the money he had in the house. The prosecutor, soon after the prisoner left him, went to a friend and communicated to him what had happened, and they came to a resolution to apprehend him, and take him before a magistrate whenever they should be able to find him. On the 18th November 1775, the prisoner, accompanied by another man, found his way, between the hours of seven and eight o'clock in the evening, to the house of the prosecutor at *Mitcham* in *Surrey*; but being alone, and having no warrant, he endeavoured, by affecting to listen to his demand of more money, to find out where he lived, and the prisoner told him that his name was *Hill Jones*, and that he would be easily found by enquiring for that name in *Cateaton-street*. The prosecutor, accordingly, on the 21st November, procured a warrant to apprehend him, but no such person was to be found in *Cateaton-street*. On the 5th January following, however, he called again on the prosecutor, threatening to impeach his character unless he gave him more money; but the prosecutor, instead of complying, apprehended him, and carried him before SIR JOHN FIELDING, who, upon examination of the circumstances, committed him to take his trial for a highway robbery. The prosecutor swore, that at the time he parted with his money, he understood the threatened charge to be the imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which the prisoner had detained him in the street, had put him in fear for the safety of his person.

THE Jury upon this evidence found the prisoner guilty; but the case was reserved for the opinion of THE TWELVE JUDGES, upon a question, Whether, under the circumstances of this case, the prisoner had been guilty of robbery?

AND the Judges were of opinion, that although the money had been obtained in a fraudulent way, and under a false pretence, yet that it was a pretence of a very alarming nature, and that a sufficient degree of force had been made use of in effecting it, to constitute the offence of *robbery*.

1776.

JONES'S CASE.

MR. JUSTICE ASTON in May Session 1776, ordered the prisoner to be put to the bar and informed him that the JUDGES were unanimously of opinion, that his conviction was strictly legal: and he accordingly received sentence of death.

CASE LXXVI.

THE KING *against* GIRDWOOD.

In a threatening letter the threat must be direct and plain; but the bare delivery of the letter, though sealed, is evidence of a knowledge of its contents, and the offender may be tried in the county where the prosecutor received it.

S. C. 2 East, 1120. Cro. Cir. Com. 153. 1 Burn, 293. 1 Hawk. P. C. 226.

AT the Old Bailey in February Session 1776, *Archibald Girdwood* was indicted on 27 Geo. II. c. 15. (*a*) and tried by a Jury of the county of Middlesex, for feloniously sending a certain letter in writing, with the fictitious letters of *J. W.* thereto subscribed and signed, to one *John Edridge*, of David-street, Berkeley-square, threatening to kill and murder him the said *John*. The contents of the letter were as follow:—

"SIR, "*February* 9, 1776.

"I AM sorry to find a gentleman like you would be guilty "of taking *Mac Allester*'s life away for the sake of two or "three guineas; but it will not be forgot by one who is but "just come home to revenge his cause. This you may "depend upon, whenever I meet you, I will lay my life for "him in this cause. I follow the road, though I have been "out of *London*; but on receiving a letter from *Mac Allester* "before he died, for to seek revenge, I am come to town. "I remain a true friend to *Mac Allester*.

"*J. W.*"

IT appeared in evidence, that the prisoner on the 9th February 1776, had delivered this letter at the Gate of Newgate, sealed up, to one *Elizabeth Robinson*, who was employed in doing errands for the prisoners; that she immediately carried it to a Penny-Post-Office in *Newgate-street*, from whence it was regularly conveyed as it was directed, to the prosecutor in *David-street*, *Berkeley-square*, which is in the county of Middlesex; but there was no proof that it was

(*a*) See now the 52 Geo. III. c. 64.

the prisoner's hand-writing, or that he was acquainted with its contents. 1776.

GIRDWOOD'S CASE.

MR. BARON HOTHAM left it to the Jury, *First*, Whether, from the fact of the prisoner's having delivered the letter to *Elizabeth Robinson*, they believed that he knew the contents of it? *Secondly*, Whether they thought the terms of the letter conveyed an actual threat to kill or murder? telling them that if they were of opinion that it did, and that the prisoner knew the contents of it, they ought to find him guilty; but that if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they ought to acquit the prisoner.

THE Jury found the prisoner *Guilty*; but the judgment was respited, and the following points submitted to the consideration of THE TWELVE JUDGES.

First, WHETHER there was sufficient evidence to be left to the Jury of the prisoner's sending the letter, *knowing the contents?*

Secondly, WHETHER the letter *purported* to be a letter threatening to kill or murder?

Thirdly, WHETHER the prisoner was properly tried by a *Middlesex Jury*, the letter having been delivered by the prisoner to *Robinson* in *London*, and by her put into a Post-Office *in London*, from whence the prosecutor received it *in Middlesex?*

ON the first day of the ensuing Easter Term, the JUDGES assembled at Serjeants'-Inn Hall, to consider of this case, and they thought that the case had been properly left to the Jury, and that there was no objection on account of the indictment having been tried before a *Middlesex Jury*.

MR. JUSTICE ASTON in the May Session following ordered the prisoner to be put to the bar, and informed him that the JUDGES were unanimously of opinion, that his conviction was strictly legal. He accordingly received sentence of death, and was afterwards executed.

1776.

CASE LXXVII. THE KING *against* GARLAND.

An out-house separated from the mansion by an open passage eight feet wide, and not connected with the mansion by any fence, is not within the curtilage.
S. C. 2 East, 493, 512.
3 Inst. 64.
Cromp. 32.
Kely. 27, 52, 82.
4 Bl. Com. 245.

AT the Gaol delivery holden at the Castle of *Taunton* in and for the county of *Somerset* on the 13th March 1776, before MR. BARON EYRE and MR. BARON HOTHAM, *William Garland* was indicted for burglariously breaking and entering the dwelling-house of *George Shore* with intent to commit a felony.

THE Jury found the following verdict: "That the prisoner "broke and entered, in the night-time, an out-house in the "possession of *George Shore*, and occupied by him with his "said dwelling-house, and separated therefrom by an open "passage eight feet wide, with intent to commit a felony: "That the said out-house is not connected with the said "dwelling-house by any fence inclosing both the said out-"house and dwelling-house, but whether," &c.

THIS case was referred to the consideration of the JUDGES: and in the Easter Term following, they were unanimously of opinion, That *from the manner in which the Jury had found the facts*, it was impossible to consider this out-house as part of the dwelling-house; for they should have found it *parcel of the dwelling-house* if it were so; for the out-house being so separated from the dwelling-house, and not within the same curtilage or common fence, was not therefore protected by the bare fact of its being so occupied with it at the same time, and therefore, as the burglary was the only offence charged in the indictment, the prisoner must be acquitted (*a*).

(*a*) *Domus mansionalis* doth not only include the dwelling-house, but also the out-houses that are parcel thereof, as barns, stables, cow-houses, dairy-houses, if they are *parcel of the messuage*, though they are not under the same roof, adjoining or contiguous to it. Co. P. C. 64. Dalton, 254. 1 Hale, 558. And it was agreed by ALL THE JUDGES in the time of *L. C. J. Hyde*, that the breaking and entering, in the night-time, *a bake-house*, eight or nine yards distant from the dwelling-house, and only a pale reaching between them, was burglary. *Castle's Case*, 1 *Hale*, 558. But if the out-house be far remote from the dwelling-house, so as not to be reasonably esteemed parcel thereof; as if it stand a bowshot off, and not within

or near the curtilage of the chief house; it is not *domus mansionalis*, nor any part thereof. *Year-Book*, 2 *Edw.* VI. *Bro. Cor.* 180. 1 *Hale*, 559. *See also Green's Case, Old Bailey, February Session* 1789, *before* MR. BARON THOMPSON, *and* MR. JUSTICE GROSE. 1776.

THE KING *against* HART. CASE LXXVIII.

AT the Lent Assizes for the County of *Worcester* 1776, *Thomas Hart* was tried for forging a bill of exchange, which was set forth in the indictment "*as follow (that is* "*to say)*," &c.

"*No.* 215. *l.*42 00 00. HULL, *April* 24, 1775.

"Two Months after date, please to pay to Mr. *Thomas* "*Jones*, or order, the sum of Forty-two Pounds, Value *re*- "*ceived*, and place the same to Account of

"GEORGE PRINCE."

"Messrs. *Halliday & Co.* Bankers, *London*."

with intention to defraud one *John Griffith*. There was a second count, for uttering it with the like intention.

A variance of "*reicevd*" instead of "*received*," is not fatal; and the words "*as follow (that is to say)*" do not bind the party to an exact recital.

S. C. 2 East, c. 19. s. 54. Salk. 660. 2 Stra. 231, 787. Douglas, 193. Cowp. 229. 2 Hawk. 616. Ld.Ray. 1515. Powel's Case, *ante*, p. 77. May's Case, *post*. Hilary Term, 1779. Beach's Case, *ante*, p. 133.

WHEN the bill was produced in evidence, it appeared that the word *received* was spelt *reicevd*, and it was of course objected, that this variance was fatal; for although the two words have the *same sound*, yet as the prosecutor had undertaken by the words "*as follow (that is to say)*" to recite the bill *secundum tenorem*, he was bound to do it literally and precisely.

IT was left with the Jury to consider whether they thought the two words imported one and the same thing; and they found the prisoner *Guilty*; but the judgment was respited for the opinion of the Judges.

THE JUDGES, on 7 June 1776, conceived it to be a proper question for the Jury; for considering it as an abbreviation, yet if it meant only the same word as that used in the indictment, it would not vitiate, for then it could only mean the same thing. MR. JUSTICE GOULD said, he considered it as the same word, only mis-spelt, and that there was not a

1776. possibility of mistaking it for any other word in the English Language (*a*); and it was held that the variance was not material (*b*).

HART'S CASE.

(*a*) The learned Judge said, "if the word had been written *receiv'd* or *recev'd*, the *e* in the one instance, and the *i* in the other, must have been necessarily understood.

(*b*) See also Strange, 889, where on "*nul tiel record*" pleaded "*segrave*," for "*seagrave*" was held no variance, *quia idem sonans*.—But *Shakespeare* and *Shakepear* are not *idem sonans*, 10 East's Term Rep. 83.

CASE LXXIX.

THE DUCHESS OF KINGSTON'S CASE.

In the House of Peers, April 1776.

A sentence of jactitation is not conclusive evidence against an indictment of bigamy; for its validity may be impeached, as having been obtained by fraud.

A peeress convicted of clergyable felony shall be discharged without burning or imprisonment.

S. C. 1 East, 468, 469.

ELIZABETH CHUDLEIGH, daughter of Colonel *Thomas Chudleigh*, of *Chelsea College*, was married to the Honourable *Augustus John Hervey* on the 4th of August 1744, at the parish-church of *Lainston* in the county of *Southampton*, as appears by the register of that place. On 9th November 1768, she instituted a suit of *Jactitation* of Marriage against Mr. *Hervey* in the Consistory Court of the Bishop of *London*; and on the 10th February 1769, sentence was pronounced, "That the said *Elizabeth Chudleigh* was and now "is a Spinster, and free from all matrimonial contracts and "espousals with the said *Augustus John Hervey*." On the 8th March 1769, Miss *Chudleigh* was married, by special licence from the Archbishop of *Canterbury*, to EVELYN PIERPOINT, *Duke of Kingston*. And on the 9th January 1775, an indictment of polygamy was found at Hicks's Hall, "That "*Elizabeth*, the wife of *Augustus John Hervey*, Esq. of "Hanover-square, in the county of *Middlesex*, being then "married, and then the wife of the said *Augustus*, feloniously "did marry and take to husband EVELYN PIERPOINT, *Duke* "*of Kingston*, the said *Augustus John Hervey* being then "alive, &c."

ON the 18th May 1775, a writ of *Certiorari* was granted by *Lord Mansfield* to remove the proceedings into the Court

1776.

DUCHESS OF KINGSTON'S CASE.

of King's Bench; but this writ was superseded; and on 11th November 1776, another writ of *Certiorari*, signed "YORK," issued to remove the proceedings before the King in Parliament.

ON the 15th April 1776, a commission was directed to *Henry* Earl *Bathurst*, Chancellor, appointing him Lord High Steward of *Great Britain*, and authorizing him to try the said indictment. The Lords came on the same day from their own house into the court erected in Westminster-Hall; and Her GRACE, who had been admitted to bail, appearing at the bar, was desired to kneel, and in that posture she was arraigned by the Lord High Steward. The indictment was then read by the Clerk of the Crown, to which the prisoner pleaded NOT GUILTY.

THE DUCHESS OF KINGSTON immediately submitted to the Court, that as her supposed marriage with Mr. *Hervey* was the ground of the present charge against her, the sentence of the Consistory Court, pronouncing her free from all matrimonial contracts and espousals with him, remaining unreversed and unimpeached, ought to be conclusive; and that no other evidence ought to be received or stated against her respecting such marriage.

THE whole of the proceedings in the Ecclesiastical Court, from the libel to the sentence, were read; and the question, Whether the sentence was conclusive or not, was very elaborately argued by the Counsel on each side (1); but the Lords ordered the trial to proceed, and after a hearing of four days, pronounced the prisoner GUILTY.

(1) For the Crown, Mr. Att. Gen. Mr. Sol. Gen. Mr. Dunning, Dr. Harris. For the prisoner, Mr. Wallace, Mr. Mansfield, Dr. Calvert, Dr. Wynne

IN consequence of this verdict, several questions were submitted to the consideration of THE TWELVE JUDGES, and the following points were resolved.

First, THAT a sentence of the Spiritual Court against a marriage, in a suit for jactitation of marriage, is not conclusive evidence, so as to stop the Counsel for the Crown from proving the said marriage in an indictment for polygamy.

Secondly, THAT, admitting the sentence to be conclusive upon such indictment, the Counsel for the Crown may be

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admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

DUCHESS OF KINGSTON'S CASE. 2 Hawk. 475.

Thirdly, THAT by the statute 1 Edw. VI. c. 12. s. 16. a *Peer*, convicted of a clergyable felony, is intitled to his immediate discharge, without reading or burning in the hand, or being liable to imprisonment by the 18 Eliz. c. 4. s. 8. AND THAT this privilege given by statute being such as may be enjoyed by a *Peeress*, is by operation of law communicated to her, and puts her in the same situation as a *Peer*. The consequence of which is, that a *Peeress* convicted of a clergyable felony, praying the benefit of this statute, is not only excused from capital punishment, but ought to be immediately discharged, without being burnt in the hand (1), or liable to any imprisonment.

(1) See 5 Ann. c. 6. and the 19 Geo. III. c. 74. s. 3.

THE prisoner was accordingly discharged.

CASE LXXX.

THE KING *against* JOHN BROWN.

If, on a sudden quarrel between two parties of keelmen and soldiers, the blow intended for an individual of the one party would, if death ensues, by accident it have amounted only to manslaughter, it will be only manslaughter, though kill another.—S. C. 1 East, 231, 245, 274.

AT the Summer Assize in 1776, for the County of *Kent*, *John Brown* was tried and convicted before MR. JUSTICE GOULD, for the wilful murder of *John Moncaster*.

3 Inst. 55. 1 Hale, 466. 4 Bl. Com. 186, 191. 5 Burr. 2793. Foster, 278. Ld. Ray. 1496. Stra. 481. Cowp. 832. 1 Hawk. P. C. c. 31. s. 44.

IT had been argued by the prisoner's Counsel, that the offence was only *Manslaughter*, and the learned Judge concurring in that opinion had so directed the Jury; but they thought fit to find the prisoner guilty of *murder*, and persisted in their verdict. Sentence of death was accordingly passed upon him; but he was reprieved from execution, until *the evidence* which had been given against him was submitted to the consideration of THE TWELVE JUDGES; and on the first day of the ensuing Michaelmas Term, the case was stated at Serjeants'-Inn Hall, to the following effect:

THE CASE. The prisoner was a common soldier in a regiment of foot commanded by Captain *Peter Hunter*, and was, at the time mentioned in the indictment, on a recruit-

1776.

BROWN'S CASE.

ing party at *Sandgate*. In this character he had behaved during the course of five years with great propriety as a soldier, and with good-nature and humanity as a man. On the 26th June 1776, he went with several of his comrades into a public-house in *Sandgate*, kept by one *Meggison*, to drink. This was between one and two o'clock in the morning. A quarrel arose soon after between the soldiers and a number of keelmen who were in the house. They went out into the street, and a violent affray ensued, which occasioned a tumult of men, women, and children. Between two and three o'clock one of the soldiers was seen stripped, and a party of five or six came up, fell upon him, and beat him cruelly. A woman called out from a window, "You rogues! you will murder "the man!" The prisoner, who had before, with his sword in the scabbard, driven a part of the mob down the street, returned; when seeing his comrade thus used, he drew his sword, which he brandished in the air, and desiring the mob to stand clear, said, "There it is, I'll sweep the street." The mob pressed in upon them, and he struck at them with the flat side several times. The mob then fled, and he pursued one of them down the street to a place called THE SWELL. The soldier who was stripped got up, and ran into a passage to save himself. The prisoner returned, and asked if they had murdered his comrade. The people came back and assaulted him several times, and then ran from him. He sometimes brandished his sword, and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier; but, before he passed, the soldier went to him, and struck him on the head with his sword. The deceased ran some paces and fell down, rose again, ran a few paces further out of the prisoner's sight, fell down again, and immediately expired. The mob ran into the passage near THE SWELL. The soldier said he had been badly used; and it was the opinion of two witnesses, that "if he had not drawn his sword, they would "both of them have been murdered."

1776. THE JUDGES were clearly of opinion, That it was only manslaughter.

CASE LXXXI. THE KING *against* WILLIAM AKEHURST.

The supposed drawer of a promissory note, *unindorsed* and not payable *to order*, having received a general release from *the holder*, is a competent witness to prove the forgery.
S. C. 2 East, 1003.

AT the Summer Assize for the county of *Sussex*, in the year 1776, *William Akehurst* was tried before LORD MANSFIELD, for forging a promissory note, payable to the said *William Akehurst*.

IT appeared in evidence, that the note was not made payable *to order*; that the prisoner had paid it away to a person in part discharge of a debt which had been long contracted; but that he had *not indorsed it*.

THE holder of the note gave a general release to the drawer of it, whose name was charged to be forged; and the question was, Whether such supposed drawer was, under this release, a competent witness to prove the forgery?

LORD MANSFIELD, after the point had been debated at the bar, received the evidence, and the prisoner was convicted (*a*).

THE prisoner received judgment, but was not executed.

(*a*) See Dr. Dodd's case, Old Bailey February 1777, *post*. 157, where the Earl of Chesterfield, the supposed obligor of the forged bond, was admitted to disprove his signature, on producing a release from Mr. Fletcher, the supposed obligee; and Rex *v*. John Taylor, Old Bailey October Session 1779, *post*.

CASE LXXXII. THE KING *against* JOHN ALFORD.

An indictment for perjury at an Assize may allege the oath to have been taken before *one* of the Judges in the commission, though the names of *both* are inserted in the caption.

THIS was an indictment at the Summer Assizes for *Somerset* 1776, for perjury, in a cause which had been tried at a previous Assize. In the caption of the indictment the names of *both* the Justices then in the commission were mentioned; and then it went on, "And the Jurors aforesaid, "now here sworn, on their oath aforesaid do further present, "that at the said trial so then and there had as aforesaid, "*John Alford*, &c. appeared as a witness upon the said trial,

1776.

ALFORD'S CASE.

" and was sworn, and took his corporal oath before the " Honourable *Edward Willes*, one of the Justices aforesaid, " on the Holy Gospel of God, &c. (he the said *Edward* " *Willes* then and there having competent authority to ad- " minister an oath to the said *John Alford* in that behalf," &c.) It then set forth the evidence, before the said *Edward Willes*, and assigned the perjury.

THE Jury found the prisoner guilty; but MR. BARON EYRE, who tried the indictment, expressed some doubt, Whether one Commissioner of Assize alone had competent authority to administer the oath; and therefore conceived the indictment ought to have alleged, that the oath was taken before *both* the Justices then in the commission.

ANOTHER doubt also arose, Whether the evidence maintained the indictment? the *nisi prius* record of the cause in which the perjury was committed, stating in the usual form, that the trial was before both the Judges.

THE case was therefore reserved; and on the first day of Hilary Term 1777, THE JUDGES were unanimously of opinion, that the conviction was good.

THE KING *against* WILLIAM SNOW.

CASE LXXXIII.

THE following case was submitted to the consideration of the TWELVE JUDGES, at Serjeants'-Inn Hall, on the first day of Michaelmas Term 1776, by MR. JUSTICE WILLES.

If on any sudden quarrel, blows pass, without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it is only manslaughter. —S. C. 1 East, 244.

AT the preceding Summer Assize for *Northampton*, *William Snow* was indicted for the murder of *Thomas Palmer*. It was questionable from the evidence, whether the crime amounted to murder, or to manslaughter; and Mr. Serjeant *Vaughan*, at the request of the learned Judge, came into court, and argued the point of law in favour of the prisoner with great ability. The Jury, however, thought that there appeared to be an *implied malice* in the prisoner's behaviour,

See the case of John Brown, *ante*, p. 148. and the cases there cited.

1776. and they accordingly found him guilty of murder (*a*). But the judgment was respited, in order to take the opinion of the JUDGES, Whether this conviction was warranted by the circumstances of the case?

SNOW'S CASE.

CASE. *William Snow* was a shoemaker; and *Thomas Palmer* a labouring man. They lived in the same neighbourhood, and at no great distance from each other. On the afternoon of the day mentioned in the indictment, the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while he was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house, and in a few minutes came out again, and set himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a woman's shoe. The deceased, having finished his thatching, was returning in his way home by the prisoner's house. On passing the prisoner as he sat on the bench, the deceased called out to him, "Are not you an aggravating rascal?" The prisoner replied, "What will you be, when you are "got from your master's feet?" On which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were struggling and fighting, the prisoner underneath and the deceased upon him, the deceased cried out, "You rogue, "what do you do with that knife in your hand?" and made an attempt to secure it; but the prisoner kept striking about, and held the deceased so hard that he could not disengage

(*a*) The Learned Judge in his note of this case, says, "But it afterwards appeared, which I did not know at the trial, that several of the "Jurymen who tried the prisoner had been on the Coroner's Inquest, "which found him guilty of wilful murder." MS.

himself. The deceased, however, made a vigorous effort, by which means he drew the prisoner from the ground, and during this struggle the prisoner gave a blow; on which the deceased immediately exclaimed, "The rogue has stabbed "me to the heart, I am a dead man!" and expired. Upon inspection it appeared that he had received three wounds; one very small on his right breast; another on the left thigh, two inches deep, and half an inch wide; and the mortal wound on his left breast. 1776. SNOW'S CASE. 44 Edw. III. pl. 44. Fulton, 126. pl. 43.

THE JUDGES, after great argument and consideration, determined, That the offence was manslaughter only, and the prisoner was recommended to a pardon. See Rex v. Taylor, 5 Bur. Rep. 2793.

THE KING *against* LAVEY AND PARKER. CASE LXXXIV.

AT the Old Bailey in December Session 1776, *William Lavey* and *Elizabeth Parker* were indicted before MR. BARON HOTHAM, on the 8 and 9 Will. III. c. 26. s. 4. for feloniously and traitorously colouring with a wash, and materials producing the colour of silver, one round blank of base metal, of a fit size and figure to be coined into counterfeit milled money, resembling the silver coin of this kingdom called a sixpence. Extracting latent silver from the body of base metal by means of *aqua fortis*, is a colouring within the 8 and 9 Will. III. c. 26. s. 4. S. C. 1 East, 166.

THE Jury found the prisoners guilty upon very clear and satisfactory evidence; but it appeared that the colour of silver was produced by melting a small portion of good silver with a large portion of base metal, and throwing it, after it had been cut into round blanks, into *aqua fortis*, which draws to the surface whatever silver there is in the composition, and it assumes the colour and appearance of real silver. A doubt therefore arose, Whether this process of extracting the latent silver by the power of the wash, from the body to the surface of the blank, was "colouring with a wash and materials," within the meaning of the statute? or, Whether the legislature did not intend such a colouring only as is produced by some external application on the surface of the blank?

1776.

LAVEY AND PARKER'S CASE.

UPON this doubt the question was referred to the consideration of the Judges. The words of the Act are, "that "whosoever shall colour, gild, or case over with gold or "silver, or with any wash, *or materials producing the colour* "*of gold* or *silver*, any coin resembling any of the current "coins of this kingdom, or any round blanks of base metal, "or of coarse gold, or coarse silver, of a fit size and figure "to be coined into counterfeit milled money resembling any "of the gold or silver coin of this kingdom, shall be guilty "of high treason."

THE JUDGES in Hilary Term 1777, were unanimously of opinion, That this process of extracting the latent silver from the body to the surface of the base metal by the power of *aqua fortis*, is *a colouring* within the words, "materials "producing the colour of silver;" and the prisoners received sentence of death accordingly(*a*).

(*a*) At Lancaster Spring Assizes 1795, William Case was tried, on the statute 8 and 9 William III. c. 26. s. 4. for traitorously colouring with materials *producing* the colour of silver a piece of base coin resembling a shilling. The prisoner was apprehended, in the very act of steeping round blanks composed of brass and silver in *aqua fortis*: none of them were in a finished state; but many were taken out of the liquor, and others were found dry. These blanks exhibited the appearance of lead, and some of them had the impression of a shilling, and by *rubbing them*, they would perfectly resemble silver coin, but in their then state the Jury found that none of them would pass current. The question was whether the offence was completed inasmuch as the colour of silver had not been produced on any of the blanks. On the case being saved for the opinion of THE JUDGES, one Judge said he understood the words "colour, &c." to mean, producing on the piece of metal the colour of silver, which was not done here; for without rubbing, the money coined would not pass: and another observed that the word in the statute was "*producing*" in the present tense, and not material *which would produce*. But all the other Judges, *absente* PERRYN B. and BULLER J. thought the conviction right; for they considered that the offence was complete when the piece was coloured, for it was then coloured with materials which produce the colour of silver; and that it was not necessary that the piece so coloured should be current, for *the colouring of blanks* was an offence within the clause: and it was observed that a contrary construction would prevent any conviction until a wash was discovered which would in the first instance produce a perfect bright shilling or sixpence. 1 East, 165.

1777.

THE KING *against* DOCTOR DODD. CASE LXXXV.

An accomplice may give evidence before a Grand Jury to support an indictment against a *particeps criminis;* and a bill so found is good, although the accomplice be not previously admitted a witness for the Crown, and was carried from prison before the Grand Jury by means of a surreptitious and illegal order.

: Old Bailey in February Session 1777, WILLIAM Doctor of Laws, was indicted on the statute of 2 Geo. . for forging a certain paper-writing, *purporting* to d in the penal sum of 8400*l.* and to be signed by the *Chesterfield* with the name "CHESTERFIELD," and to l and delivered by the said Earl: AND ALSO, for forg- rtain paper-writing, *purporting* to be an acquittance ipt for money (*to wit*) 4200*l.* and to be signed by *Earl of Chesterfield* with the name "CHESTER- ."

indictment consisted of eight counts, charging the with having knowingly uttered and published as said paper-writings; and laying the offence to have nmitted with an intention to defraud, *first*, the *Earl rfield*, and *secondly*, Mr. *Henry Fletcher*.

names of *William Dodd* and one *Lewis Robertson* scribed both to the bond and to the receipt, as at- witnesses of the signature "CHESTERFIELD." The ors charged them with being equally guilty of the and from the evidence which was given against them examination before the magistrate, they were com- Newgate as principals in the same felony; and the *Chesterfield* and other witnesses were bound in a ance to appear against, and prosecute both of them ipals in the same degree.

L of indictment was preferred at the ensuing Session s's Hall, before the Grand Jury for the County of ex, against *William Dodd* only; and the agents for ecution obtained an order from Mr. *Deacon*, the f the Arraigns at the Old Bailey, dated the 19th y 1777, and directed to the Keeper of Newgate, ding him to carry *Lewis Robertson* before the Grand Hicks's Hall, for the purpose of giving evidence in of the indictment against *William Dodd;* and by

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DODD'S CASE.

virtue of this order he was removed to Hicks's Hall, and examined before the Grand Jury accordingly. The bill was found "*a true bill*," and the name of *Lewis Robertson* indorsed, among others, on the back of it, as a witness for the Crown. On the 21st February, the Justices of Gaol Delivery at the Old Bailey, being informed of the order which Mr. *Deacon* had made, and of the transaction which had taken place in consequence of it, made another order, declaring that the order of the 19th February had been surreptitiously obtained, and that it was *illegal* and *void*.

DOCTOR DODD, on being called to arraignment on this indictment, submitted to THE COURT, That as *Lewis Robertson* was in custody under a legal warrant of commitment, as a principal in the offence with which *he* was charged, and, without having been admitted a witness for the Crown by any legal authority, had been carried before and examined by the Grand Jury, by virtue of a surreptitious and illegal order, the indictment against *him* had been found upon improper evidence, and therefore he ought not to be compelled to plead to it.

THE point was argued before MR. JUSTICE GOULD, MR. JUSTICE WILLES, and MR. BARON HOTHAM, by *Howarth*, *Cowper*, and *Buller*, Counsel for the prisoner; and by *Mansfield* and *Davenport*, for the Crown.

IT was however ultimately agreed that the trial should proceed; and, on the Jury finding the prisoner GUILTY, the sentence was respited, and the question submitted to the consideration of THE TWELVE JUDGES.

ON the first day of May Session following, MR. JUSTICE ASTON delivered the result of their conference to this effect: —"The Judges have met, and have fully considered the "whole matter of this objection; and they are unanimously "of opinion, that the necessity of some proper authority "to carry a witness, who happens to be in custody, before "the Grand Jury to give evidence, regards the justification "of the Gaoler only; but that no objection lies upon that "account in the mouth of the party indicted; for in respect

" to him, the finding of the bill is right and according to " law. 1777.

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" WHETHER a private prosecutor, by using an accomplice " in or out of custody as a witness, gives such a witness a " plea not to be prosecuted (1), or can entitle the prosecutor " himself to have his recognizance discharged, is a matter " very fit for consideration, under all the circumstances of " the particular case whenever that question shall arise; but " it is a matter in which the party indicted has no concern, " nor can he make any legal objection to the producing such " a person as a witness; for the accomplice is, against him, " a legal and a competent witness; and so was *Lewis Ro-* " *bertson* upon the bill of indictment found upon this occa- " sion.

(1) See the case of Mrs. Rudd, *ante*, page 115, Case 70.

" THE JUDGES therefore are of opinion, That the pro- " ceedings upon that indictment were legal, and that the pri- " soner was convicted according to law."

SENTENCE of death was passed upon the prisoner, on the last day of the Session, and he was executed at Tyburn accordingly.

THE EARL OF CHESTERFIELD was produced as a witness on the trial, to prove that the name " CHESTERFIELD" was not his signature; and on producing a release from Mr. *Henry Fletcher*, the supposed obligee of the bond, he was admitted to give his evidence.

The supposed obligor of a forged bond, being released by the obligee, is a competent witness. See Akehurst's case, *ante*, 150.

THE KING *against* PLATT.

CASE LXXXVI.

OLD Bailey February Session 1777. The prisoner had been committed to the Gaol of Newgate on the 23d January 1777, by virtue of the following warrant,

" Middlesex, } " To the Keeper of his Majesty's Gaol of
" to wit. } " Newgate, or his Deputy.

A prisoner committed to Newgate for high treason in North America, who is only triable before the King's Bench, or under a special commission, cannot be admitted to bail under the *Habeas Corpus* Act, by Justices of Gaol Delivery, or discharged by their proclamation for want of prosecution.

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"THESE are in his Majesty's name to authorise and re-
"quire you to receive into your custody the body of *Ebenezer*
"*Smith Platt*, herewith sent you, charged before me, upon
"the OATH of *Richard Scriven* and *Samuel Burnet*, with
"HIGH TREASON at Savannah in the Colony of Georgia in
"North America: and you are to keep him safe, until he
"shall be delivered by due course of law: and for so doing
"this shall be your sufficient warrant.

"W. ADDINGTON."

BY the HABEAS CORPUS ACT, 31 Car. II. c. 2. s. 7. it is enacted, "That if any person or persons committed for high "treason or felony, plainly and specially expressed in the "warrant of commitment, upon his prayer or petition in "open Court, the first week of the Term, or *first day* of "the Sessions of Oyer and Terminer, or General Gaol Deli-"very, to be brought to his trial, shall not be indicted some "time in the next Term, Sessions of Oyer and Terminer, "or General Gaol Delivery, after such commitment, it shall "and may be lawful to and for the Judges of the Court of "King's Bench, and Justices of Oyer and Terminer, and "General Gaol Delivery, and they are hereby required, "upon motion to them made in open Court, the last day of "the Term, Sessions, or Gaol Delivery, either by the pri-"soner or any one on his behalf, to set at liberty the prisoner "upon bail, unless it appear to the Judges and Justices, upon "oath made, that the witnesses for the King could not be "produced the same Term, Sessions, or General Gaol De-"livery: and if any person or persons committed as afore-"said, upon his prayer or petition in open Court, the first "week of the Term, or first day of the Sessions of Oyer "and Terminer and General Gaol Delivery, to be brought "to his trial, shall not be indicted and tried the second Term, "Sessions of Oyer and Terminer, and General Gaol Deli-"very, after his commitment, or upon his trial shall be ac-"quitted, he shall be discharged from his imprisonment." PROVIDED, "That if any person or persons at any time "resident in this realm, shall have committed any capital "offence in *Scotland* or *Ireland*, or any of the Islands or

" Foreign Plantations of the King, his heirs or successors, " where he or she ought to be tried for such offence, such " person or persons may be sent there, to receive such trial, " in such manner as the same might have been used before " the passing of this Act."

BUT by the statute of 35 Hen. VIII. c. 2. it is enacted, " That all treasons committed out of this realm of England " shall be enquired of, heard, and determined before the " Court of King's Bench, or else before such commissioners, " and in such shire of the realm, as shall be assigned by the " King's commission," &c. See 33 Hen. VIII. c. 23.

To enable the prisoner to procure his discharge under the *Habeas Corpus Act*, he presented his petition to THE COURT of Oyer and Terminer, and General Gaol Delivery (1), at the Old Bailey, on the first day of the February Session next after his commitment; and no indictment having been preferred against him, nor any affidavit made that the witnesses for the Crown could not be produced during that Session, he prayed (2) on the last day of the Session, that he might be admitted to bail and discharged.

(1) Mr. Justice Gould, Mr. Justice Willes, Mr. Baron Perryn, Mr. Serjeant Glynn, Recorder.

(2) See Barnardi's Case in the Appendix to the 10 St. Trials, 64.

A QUESTION arose, on the form of his commitment, Whether the Court of Gaol Delivery by their general power under the commission, or by their special power under the *Habeas Corpus Act*, had sufficient authority for this purpose?

THE question was argued by MR. HOWARTH and MR. ALLEN for the prisoner, and by MR. ATTORNEY-GENERAL (3) and MR. WALLACE for the Crown.

(3) Edward Thurlow, Esq.

FOR THE PRISONER. Justices of Gaol Delivery have by the common law jurisdiction in high treason, by virtue of the generality of their commission; the words of which include all prisoners alike without exception (4). This is confirmed by the statute of 1 Edw. VI. c. 7. which enacts, " That " in all cases where any person shall have been found guilty " of any manner of treason, and reprieved before judgment, " subsequent Justices of Gaol Delivery shall have power to " give judgment of death against such person, as the Jus- " tices before whom such person was found guilty might have

(4) In the modern commissions of Gaol Delivery, *treasons* are expressly included. *See App. to 4 vol. Black. Comm.*

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"done, if *their commission of Gaol Delivery* had continued "in force." And it follows, says LORD COKE, 4 *Inst.* 169. that by the judgment of the whole Parliament, they may now deliver the gaol of prisoners committed for this high offence. By the HABEAS CORPUS ACT also, they are empowered to admit to bail a prisoner committed for high treason who has petitioned for his discharge, and who has not been indicted some time in the next Session after his commitment. Mr. *Platt* therefore, being found in the gaol, and having complied with the forms of the Act, is entitled either to be discharged, upon the proclamation under the commission of Gaol Delivery (5), or to be *bailed* by virtue of the statute; for otherwise a person might be imprisoned for life, without the possibility of redress; and the Court in its exercise of its powers by common law, or in the construction of the statute, will incline to do that which is most favourable to the liberty of the subject.

(5) 2 Inst. 43. 4 Bl. Com. 270.

BUT it may be said, that this authority to admit a prisoner to *bail* under the HABEAS CORPUS ACT, or to discharge him at THE CALL OVER does not extend to cases of high treason which are not within the jurisdiction of the Court *to try;* and that the present case, from the statement in the warrant that the fact was committed at *Savannah*, can only be tried in the Court of King's Bench, or under a special commission, by virtue of the statutes 33 Hen. VIII. c. 23. and 35 Hen. VIII. c. 2.

As to the first point, suppose a person is in the gaol of Newgate for high treason committed in the County of York, this Court has no jurisdiction *to try* such a prisoner; and yet if his prosecutors were to neglect to remove him in due time by *Habeas Corpus* to the gaol of the County in which the offence was committed, and in which County alone he could be tried, the Court under such circumstances would certainly have a power to receive a petition for his discharge, and by admitting him to *bail* at the end of the Session, would prevent the perpetual imprisonment which must otherwise result from his prosecutors' neglect. Admitting therefore that the present offence can only be

tried in the Court of King's Bench, or under a special commission, it was the duty of the officers of the Crown to have procured such trial. A more than sufficient time has elapsed for that purpose, and Mr. *Platt* has given public notice that he was ready to prove his innocence. He has no mode by which he can compel the Crown to issue the commission; and unless this Court will interpose, and force on a prosecution from the Crown, by the peril of the prisoner's discharge, he must lie in gaol until the mercy of the Crown shall please to release him; for the Court cannot make an order to remove such prisoners to the proper jurisdiction, and by that means enable them, if innocent, to procure a legal discharge. 1777. PLATT'S CASE.

But it does not appear by the warrant under which Mr. *Platt* is committed, that he is other than an ordinary prisoner in the gaol of the Court for high treason; for, if the words of the warrant are not sufficiently technical or certain to bring him within the scope of the statutes of 33 Hen. VIII. c. 23. and 35 Hen. VIII. c. 2, the Court will not intend or presume any thing in order to place him within another jurisdiction. On the contrary, so far as intendment and presumption can go, the Court will be *astute* in favour of the personal liberty of a man who is confined in a country far distant from his own, and who has exerted every endeavour on his part to procure a trial. The 33 Hen. VIII. c. 23. enacts, "That any person who on being "examined before the Privy Council shall be *vehemently* "*suspected* of any treason, may be tried in any County by "virtue of a special commission, although such treason was "committed in any other shire or place within or *without* "the King's dominions." But some doubts having arisen respecting the trial of treasons committed abroad, it is enacted by 35 Hen. VIII. c. 2. "That all treasons committed *out of this realm of England* shall be tried either in "the Court of King's Bench, or in any County by virtue "of a special commission." The warrant of commitment therefore, in order to bring an offender within the operation of these statutes, ought to have alleged that the treason

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was committed at such a place, *without the realm of England:* but the present warrant merely states, "for treason "committed at Savannah, in the Colony of Georgia, in "North America:" and it cannot be intended that this place is *without the realm of England*, unless that fact had been positively averred. If a special commission had issued for the trial of the prisoner, it would have averred that the offence was committed *without the realm*. The indictment must necessarily have followed that description; for there cannot be a doubt but that if it had only stated the treason committed at Savannah, in the Colony of Georgia, in North America, it would have been uncertain and bad; and the same degree of certainty is requisite in the warrant of commitment. The special commission under which *Captain Roche* was tried for a murder committed at the Cape of Good Hope, averred that he was *vehemently suspected* by the Council; that the crime had been perpetrated in parts *beyond the seas*, at the Cape of Good Hope, *without the realm of England;* and directed the commissioners to try him for a murder committed *without the King's dominions*, exactly pursuing the essential words of the statute on which the commission was founded. The indictment adopted the same form, and followed the averments in the commission; and the warrant on which he was apprehended was drawn with equal certainty.

2 Bl. Rep. 1165. 2 Hawk. P. C. 181.

IN the case of *The King* v. *Sayer*, who was committed for *treasonable practices*, the certainty required in commitments for HIGH TREASON was ably and elaborately discussed; and LORD MANSFIELD declared the warrant too general and vague, and that commitments for this offence ought to contain the greatest certainty. Suppose a man committed under a warrant for *stealing* a variety of things, without saying that he *feloniously* stole them, there cannot be a doubt but that such a warrant would be bad from its uncertainty (1); and yet every body knows by the import of the word "*stealing*," that stealing is a felony.

(1) *Sed vide* Rex *v.* Judd, 2 Term Rep. 255. and *post.* Hilary Term, 28 Geo. III.

UPON this single ground therefore, *viz.* the uncertainty of the warrant, whatever the Court may conceive of their

general power under the *Habeas Corpus Act*, the prisoner will be entitled to his discharge. 1777.

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FOR THE CROWN. Justices of Gaol Delivery have no jurisdiction *to try* the offence for which the prisoner is committed; and therefore have no power to discharge him by proclamation under their commission, or to admit him to *bail* by virtue of the statute.

THE commission of Gaol Delivery is unquestionably of very high antiquity, and confers a very extensive power; it is the next in order to the ancient commission of *Eyre*, and was frequently sent out during the intervals of the ITER; but by tracing its history from year to year, through the several cases in the Year-books (1), it will be found that limits have been fixed to the jurisdiction of its Justices, and that their power is not, as now contended for, co-extensive with the walls of the prison. They cannot discharge a prisoner *for debt*, committed by legal authority, on the ground that his commitment is informal; and their criminal jurisdiction is confined merely to that class of prisoners who lie in gaol for their *deliverance*, and does not extend to such prisoners as are *attached* by any other competent judicial authority. Their authority to act upon the cases of the several prisoners, is merely incidental to their power of delivering the gaol of such prisoners as are within their jurisdiction. Previous to the statute of 4 Edw. III. c. 2. they could not proceed upon an indictment taken before Justices of the Peace. *Year-Book*, 15 *Hen.* VIII. *pl.* 5. And even by force of the 1 Edw. VI. c. 7. from which they derive all their present authority over the crime of high treason, they cannot allow a pardon to a man *condemned* under a former commission of Gaol Delivery. *Dalison*, 20 (2). An attentive perusal of this statute will prove that the whole scope and purpose of it was merely to bring into the Gaol Delivery prisoners *in franchise*, so that every offender within the county might derive the benefit of deliverance; and therefore it inflicts a penalty upon all sheriffs, lords of franchise, and keepers of gaols within the county, who shall neglect to bring in criminals in due time; which evinces that it was

Crom. Jur. 131.
4 Inst. 168, 184.
Bro. Com. 23.
2 Rich. III. pl. 47.
Co. Lit. 293.
Bac. Elem. 15, 16.
1 Reeve, 57.

(1) 4 Edw. III. pl. 32.
6 Edw. III. pl. 35.
23 Edw. III. pl. 21.
15 Hen. VII. pl. 5.
F. N. B. 240.

Cro. Eliz. 90, 179.
Ander. 111.

(2) 7 Co. 31.
12 Co. 33.

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not in the contemplation of the legislature, that any other but those who could be tried before the Justices of Gaol Delivery should be brought in. The whole extent and compass of their authority is, that they may proceed upon an indictment against a prisoner who is in gaol upon his deliverance; and that if no prosecution is instituted against such a prisoner, during the continuance of the commission, they may discharge him after inquest by proclamation; that is, if no indictment has been preferred against him before the Grand Jury, or, being preferred, is returned *Ignoramus*. From these observations it appears, that the Justices of Gaol Delivery cannot *discharge* prisoners whose offences they have not power to try; and previous to the statute of 1 Edw. VI. c. 7. they had no jurisdiction to try high treason; therefore, says *Sir William Staunford*, they could not deliver the gaol of prisoners committed for this offence; and it is the uniform opinion of *Crompton*, *Coke*, *Hale*, and *Hawkins*, that they have derived this power entirely from the authority which that statute gives them to hear and determine on the crime.

But it is contended in favour of the prisoner, that the Court may *deliver* the gaol of prisoners whom they have no power *to try*; and that from a defect of certainty in the present warrant of commitment, Mr. *Platt* is to be considered as a prisoner within the scope of their ordinary power and jurisdiction.

As to the first point, a case has been supposed, of a man committed to Newgate for high treason in the County of York, and not removed by *Habeas Corpus* to his proper jurisdiction. In such a case, the Court may deliver the gaol of its prisoners, but they cannot either discharge or bail him (*a*). This is done by a mere *warrant*, without issuing a *Habeas Corpus*, commanding the gaoler in whose custody he is confined to deliver him, and the gaoler of the place where the offence is committed to receive him, in order that he may be subject to his proper tribunal for trial. Instances have occurred, where men have been committed to prison

1 Shower, 190. Lucas, 429.

(*a*) But see the Case of Rex *v.* Yates, 1 Show. 191.

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in *England* for felonies done in *Ireland*; yet the Justices never conceived them to be objects for their deliverance; but upon certificate of an indictment found within the proper jurisdiction, they have been removed by an order from the Secretary of State, under that power which is recognized by the *Habeas Corpus Act*. There was not long ago a case of murder at *Barbadoes*, and of a *felonious* marriage in *Ireland*, where the parties were committed to Newgate; and it never entered into the imagination of those great men who appeared in favour of the prisoners, that they could be discharged by proclamation on the last day of the Session. The proclamation is nothing more than calling upon the prosecutor to charge such prisoners as stand upon their deliverance with a crime; and it would be absurd to call upon the officers of the Crown *here*, on the last day of a Session, to prosecute a prisoner for murder, or other felony, *in Ireland*. The Court therefore, finding such a prisoner in gaol, attached for a crime which they have no jurisdiction to try, must necessarily detain him, that he may be delivered over to another custody for trial; and it will not follow, as suggested on the other side, that a man must remain imprisoned for life, because all jurisdictions are not confounded, and every inferior Court, nay, even a Justice of the Peace, permitted to allow bail in cases of high treason; for to that conclusion the arguments in favour of the prisoner extend. It is truly said, however, that in the present case the Court cannot make an order to remove Mr. *Platt* to another jurisdiction: and also that as they cannot deliver the gaol of him by that means, he ought to be delivered by proclamation; but the argument drawn from these premises is false and inconclusive. The prisoner by the 38 Hen. VIII. c. 2. may be tried either in the Court of King's Bench, or under a special commission. The gaol of Newgate, and every other gaol in the kingdom, is considered as a gaol within the general jurisdiction of the King's Bench. Mr. *Platt* therefore is at present in the proper custody of that Court in which an indictment against him may be preferred, and which undoubtedly has jurisdiction to try his offence; and an order in such a case would be vain, idle, and insignificant.

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But it is contended, that if the prisoner cannot be *discharged* under the proclamation of Gaol Delivery, yet having complied with the forms of the *Habeas Corpus Act*, he may be admitted to *bail* by virtue of that statute. It has been shewn already, however, that the power of this Court, under this Act, cannot extend to prisoners whom they have not jurisdiction to try; and a variety of cases are to be found in the books which prove this position. But even admitting for a moment that the Court possessed concurrent jurisdiction in this case with the Court of King's Bench, they would surely exercise it with similar discretion. Suppose then that Mr. *Platt* had obtained a *Habeas Corpus* to the King's Bench to be bailed, would that Court admit him to bail under the circumstances of this case? The return would inform the Court, that he had lain in gaol one Term; that he had made no application to *that* Court; that the prosecutor had not preferred any indictment against him; that he was in custody, in the gaol of the Court, on a charge of high treason committed in the province of Georgia during the existence of a rebellion there, in the course of which rebellion he was committed for the crime. It is not assuming too much to say, that, in such a case, the wisdom of the Court would not think itself called upon to effect his discharge. Sir *William Wyndham* was apprehended during the rebellion which then existed: in Trinity Term 2 Geo. I. he applied to the King's Bench to be bailed, and the Court, upon the single ground that he had been apprehended for high treason *bello flagrante*, immediately remanded him, and he was not bailed until the rebellion had subsided, and four terms had elapsed from the period of his commitment. This case abundantly proves that the Court, if they possessed the power, are not obliged to discharge the prisoner *ex necessitate*, or to admit him to bail without reference to any kind of discretion; but it is the clear and established law of the realm, that the Court of King's Bench alone can bail in cases of high treason.

Strange 3. 3 Viner's Abr. 516.

As to the defect of certainty in the warrant of commitment, the whole of the observations that have been made amount to this: That an indictment for this offence must charge it to

have been committed *without the realm*, and the precedent of *Captain Roche's* commission and indictment was quoted to support it; but no kind of learning upon the form of *warrants*, nor any one decided case upon the subject of *warrants*, has been produced to the Court. Much less strictness is required in a *warrant* than in an *indictment*; and it is not easy to conceive, whatever may have been the practice, that the averment contended for is indispensably necessary in an indictment for this crime; for the statutes of Henry the eighth make the question of the *venue* immaterial, otherwise than as a matter of mere formality. But if this argument were well founded, it would not avail the prisoner; for there is no analogy between the form of *indictments* and the form of *warrants*; and Courts have in their decisions always gone upon the fair, direct, and substantial intendment of the warrant, and not upon mere technical expressions. But suppose the averment "*without the realm*" to be necessary, the prisoner could not in that case be tried before this Court; and the only consequence would be, that he must be sent over to the place where the crime was committed (1).

(1) Comberley's Case, Strange, 848.

THE COURT. A warrant of commitment must contain *convenient certainty*; and therefore it is not necessary to allege that the charge was made upon oath, for a commitment may be *super visum*, and then an oath is unnecessary. This doctrine is completely established in the case of *Kendal* v. *Roe*, 5 *Mod.* 78. *Sir William Wyndham's case*, 1 *Strange*, 2. *Mr. Wilkes's case*, 2 *Wils.* 158. 11 *State Trials*, 304. and *Curtis's case*, *Foster*, 136. The charge in the present commitment is upon oath; so far it is more explicit and full than the law requires: it further alleges, that the prisoner was charged with high treason at *Savannah*, in the Colony of *Georgia* in *North America*. The common understanding of every man is informed, that this *North America* is part of one of the four divisions of the world, and that it is without the four seas of Great Britain: The Court therefore cannot intend, against common sense, common language, and grammar, that there may be a place situate *in England*, known by the description of "*Savannah*, in the Colony of *Georgia*,

1 Salk. 347. 3 Vin. Ab. 515. 2 Inst. 52. Palm. 558. 10 Mod. 334. 1 Hale, 582. 2 Hawk. 186.

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"in *North America*." Even if it were an indictment, in which a greater strictness is required, such an intendment could not be supported by any known rules of artificial reasoning. This warrant therefore contains *sufficient certainty* to shew that the high treason which it charges the prisoner with having committed, was in fact committed *out of the realm of England*. It was the ancient opinion, that the species of treason which consists, by 25 Edw. III. c. 2. in *adhering to the King's enemies*, might be tried, before the statute 35 Hen. VIII. c. 2, within the kingdom, by the rules of the common law, though the *aid and comfort* was afforded *without the realm*; but that every other species of treason committed out of the realm, must be tried in the place where it was committed, or under the provisions of that Act of Parliament. Perhaps therefore in every other species of treason except that first mentioned it would be necessary, both in the special commission and in the indictment, to pursue the language of the Act, and to aver that it was committed *without the realm*; but, without giving an opinion upon this point, it is not necessary to use such an averment in the warrant of commitment.

See 1 East's C. L. 104, 105.

As to the question, Whether Justices of Gaol Delivery can admit a prisoner to bail for high treason, independent of the *Habeas Corpus* Act, it is very clear that the Court of King's Bench alone possesses such a power (1); and as the King's Attorney General opposes the discharge of this prisoner, it is unnecessary to consider whether the Court could have discharged him under the proclamation, upon a supposed assent of the Crown, if the matter had passed *sub silentio*.

(1) 2 Hale, 129. 8 Mod. 96.

The Habeas Corpus Act unquestionably authorizes Justices of Oyer and Terminer and General Gaol Delivery to admit prisoners to bail for high treason, on their complying with the forms mentioned in the Act; and being made to protect the liberty of the subject, it ought always to receive such a construction as appears most conducive to that end: but the question in the present case is, Whether the species of high treason for which Mr. *Platt* is in custody is within the cognizance and power of the Court?

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PLATT'S CASE. Vaugh. 140.

THE commission under which the present Court of Gaol Delivery acts, is a general Commission of Gaol Delivery for all offences in a common and ordinary way committed *in the county of Middlesex*. The high treason for which the prisoner is in custody, sufficiently appears on the face of the warrant to have been committed *out of the realm*. The statute of 35 Hen. VIII. c. 2. says, that all treasons committed *out of the realm* shall be tried either before the Court of King's Bench, or under a special commission; and it is in the option of the Crown to select which of these judicatures it pleases for the trial of the prisoner. The petition therefore to a Court of Gaol Delivery, who have no power at all to try the prisoner, is nugatory and void. In the case of *the King* v. *Yates* (1), who was committed for high treason to the prison at *Hull*, an application was made to the King's Bench in the first week of the ensuing term, pursuant to the direction of the *Habeas Corpus* Act: and by HOLT, Chief Justice, "The words of the Act are certainly in the *disjunc-* "*tive*, that the prisoner may petition the King's Bench, *or* "the Gaol Delivery; but it must be taken *respectively*, other- "wise the felons in all the gaols in England must be dis- "charged; for if they are committed just after the assizes, "and come hither, they must be *bailed*, if they are not in- "dicted before the end of the first Term, and if not tried "before the end of the second term, must be *discharged;* "and yet they cannot be indicted but in the county where "the offence was committed, which can never be thought the "intent of the Act." This case proves that the application ought to be made to that Court only which has jurisdiction to try the offence. Suppose even that no Act of Parliament had pointed out the proper jurisdiction for the trial of this offence, all that the Court could have done in such a case would have been, to enquire by what method the prisoner could have been sent over to Georgia, in order to receive a legal trial, but he could not have intitled himself under the *Habeas Corpus* Act to be discharged. Captain *Roche*, under similar circumstances, petitioned this Court, in July Session, to be discharged under the *Habeas Corpus* Act; but the

(1) Show. 190. B. R. Hill. 2 Will. and Mary. Comb. 6. 4 Inst. 71. 1 Mod. 97. Stiles, 418. Lutw. 12. Salk. 103.

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Court did not allow his prayer; and he was continued in gaol, although he was not tried till the *December* Session following, and although the *September* Session had intervened. Pirates are frequently committed to *Newgate*, to be tried at the *Admiralty Session*, and no notice is ever taken of such prisoners at the *Gaol Delivery*, nor any enquiry made when a Commission of Admiralty is to issue (1). In the present case, it does not depend on the will of the crown, whether a special commission shall issue or not; for the prisoner may apply, under the *Habeas Corpus* Act, to the Court of King's Bench, to be tried or bailed; and if not tried in two terms after his prayer is received, he will be intitled to his discharge; but this Court cannot interpose.

See 1 Strange, 142.

(1) See the 30 Geo. II. c. 25. s. 20. 1 Hawk. P. C. 158, 159.

Prisoner in custody under defective commitments may be discharged under a gaol delivery.

MR. SERJEANT GLYNN, Recorder. I concur in opinion with the learned Judges, that this Court cannot upon the present occasion release Mr. *Platt*; but I do not accede to the position, that the power of Justices of Gaol Delivery extends only to the cases they are competent to try. Common experience proves, and necessity requires, that their power should extend to all prisoners committed for crimes. It is true, they have not a power, like a Court of Error, over summary convictions; but if prisoners are committed to take their trial in other counties, and before other jurisdictions, Justices of Gaol Delivery are to take notice, that it is a legal detention for a legal purpose. Suppose a prisoner in custody under a commitment so absurd, informal, and substantially defective that it does not amount to any charge importing that he is within the jurisdiction of the Court, or that he is to be removed to any other jurisdiction to be tried, such a prisoner would surely be intitled to his deliverance under the proclamation. A case of this kind occurred within my own practice, where a man was charged with divers offences in divers counties, in such a manner that it was impossible to determine how or where he was to be tried, and at the end of the Session I ordered him to be discharged. A prisoner charged with an offence triable under a special commission, must remain a convenient time in gaol, for the purpose of such trial, and the Court will examine whether he is legally

Prisoners triable under special commissions may be discharged by gaol delivery. *Sed Qu.*

detained for that purpose; but I conceive that if he is detained beyond a legal time, and no care taken or expedition used to bring him to trial, the liberty of the subject requires that the Court should interpose, and effect his discharge. 1777. PLATT'S CASE.

THE prisoner was remanded.

THE KING *against* ROBERT MARTIN.

CASE LXXXVII.

AT the Lent Assizes at Northampton in the year 1777, *Robert Martin* was indicted for that he "on the 5th February 1773, with force and arms, at the parish of *Southwich* in the county of *Northampton*, twenty pounds weight of wool, of the value of ten shillings, of the goods and chattels of one *James Capps*, then and there being found, feloniously did steal, take, and carry away, against the peace of our said Lord the King, his crown and dignity."

Pulling wool from the bodies of live sheep and lambs, *animo furandi*, is felony. S. C. 2 East, 618.

IT appeared by the evidence, that the prisoner had pulled the wool from the bodies of sixteen lambs and lamboxes, *viz.* lambs of a year old, whilst they were living; and in some places had torn the skin away with it.

THE property being taken from the bodies of living animals, a doubt arose, Whether it was the subject of larceny? and the question was referred to the consideration of the Judges.

THE JUDGES were unanimously of opinion, That it was larceny; and the principle they went upon was, that where larceny may be committed of the thing itself, it may also be committed of the produce of that thing: therefore it is no larceny at common law to gather and carry away the fruit from a tree which is growing, because, from its adherence to the freehold, it is not larceny to steal the tree itself. But it has been lately determined, upon a case reserved by MR. JUSTICE BATHURST, (*a*) that larceny may be committed by

Easter Term, 1777.

(*a*) It was reserved, it seems, by Mr. Serjeant Leigh, who sat for MR. JUSTICE BATHURST, on the Oxford circuit about the year 1769. 2 East, 617.

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MARTIN'S CASE.

taking the milk from a cow, because it would be larceny to steal the cow itself. This distinction is agreed to by most of the ancient writers upon Crown Law. *Dalton*, 21. (1) *Crompton*, 36. But to prevent the thoughtless and wanton frolicks which might be played with these trifling kinds of property from being prosecuted as petty larcenies, when perhaps they were unmixed with any fraudulent or felonious design, the law, proceeding upon the idea *de minimis*, requires the property stolen to be of the value of *twelve-pence*. The question therefore, whether felony or not, must depend on the circumstances denoting the intention; on the quantity of property taken; on the behaviour of the party at the time; and if a wicked disposition be discovered, *une disposition à faire un mal chose*, as it is described by *Britton*, it may be evidence of felony, notwithstanding the trifling quantity of the thing taken.

(1) Chap. 156. page 501. Edit. 1627.

CASE LXXXVIII.

THE KING *against* EDWARD TAFT.

To indorse a bill in a *fictitious name* is forgery, although the money might have been as well obtained by indorsing it in the *real name* of the person who uttered it.

S. C. 2 East, 959.

See Taylor's Case, *post*.

AT the Lent Assizes for the county of Leicester 1777, *Edward Taft* was tried before MR. JUSTICE NARES, for forging an indorsement on a bill of exchange for fifty pounds. The Jury found the prisoner *Guilty*; but the learned and humane Judge, cautious of passing sentence of death in a case which admitted of doubt, submitted to the consideration of THE TWELVE JUDGES, Whether, upon the following state of facts, the conviction was proper?

THE bill of exchange was drawn payable to the order of Messrs. *Renwicke* and *Mee*, by whom it was indorsed generally, and it afterwards became the property of one *William Wheewall*, out of whose pocket it had been picked or lost, with other things at Leicester races, on the 16th September 1776. The prisoner had the very same night endeavoured to negotiate it at *Leicester*; but being disappointed, he proceeded to *Market Harborough*, where he bought a horse of one *John Ingram*, the landlord of the inn, and offered him this bill to change. The landlord not having cash sufficient in the

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house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had indorsed it, and that if he (the landlord) would put his name on the back of it, it should be immediately discounted. The landlord however, not knowing the person from whom he had received it, refused to indorse it; but told the clerk that the gentleman was then at his house, and he would go and fetch him: accordingly he went to the prisoner, who accompanied him to the banker's. The clerk then told the prisoner, that it was the rule of their shop never to take a discount bill unless the person offering such bill indorsed it; and therefore if he (the prisoner) would indorse it, it should be discounted. The prisoner immediately indorsed it by the name of "*John Williams*," which was not his own name, and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner, in his defence, said he had found it.

THE JUDGES on the 13th June 1777, were unanimously of opinion, That this was a forgery within the statute; for although the fictitious signature was not necessary to his obtaining the money, and his intent in writing a false name was probably only done to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill, and on the person who discounted it. The one lost the chance of tracing his property, and the other lost the benefit of a real indorser, if by accident, the prior indorsements should have failed: and that the forging a name either of a real or of a fictitious person, with intent to defraud, had been holden to be forgery in the case of *Rex* v. *Lockett* (*a*).

See the Case of *Hyam Levy*, who was convicted upon the authority of this case, at the Old Bailey in Oct. Session 1782.

(*a*) See the case of Tatlock *v.* Harris, 3 Term Rep. 176. and the case of Gibson and Johnson *v.* Minet and Fector in error, 1 H. Black. Rep. C. B. 588.

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CASE LXXXIX. THE KING *against* JOSEPH JONES.

On an indictment against an apprentice for inlisting himself as a soldier, the indentures must be proved by the subscribing witnesses. S. C. 2 East, 822.

AT the Lent Assizes 1777 for the City of *Coventry*, *Joseph Jones* was tried before MR. JUSTICE NARES for a misdemeanor. The indictment was as follows: "The Jurors of "our Lord the King, upon their oath, present, that *Joseph* "*Jones*, late of the parish of *Birmingham*, in the County of "*Warwick*, Jobbing Smith, on the ninth day of December, "in the seventeenth year of the reign of our Sovereign Lord "George the Third, King of *Great Britain*, &c. was an "apprentice bound by indenture to serve *William Lucas*, "of the parish of *Birmingham* aforesaid, in the county afore-"said, Jobbing Smith, for the then remainder of a term of "seven years, commencing from the twenty-eighth day of "August, in the eleventh year of the reign of our said Lord "the King; and the said *Joseph Jones* being a person of ill "name and fame, and of dishonest conversation, devising and "intending fraudulently and unjustly to obtain and acquire "to himself divers sums of money of and from the Paymaster "of his Majesty's Seventh Regiment of Foot, commanded "by the Honourable Colonel *Robert Bertie*, commonly "called Lord *Robert Bertie*, to defraud our said Lord the "King of divers sums of money, afterwards, to wit, on the "said ninth day of December in the said seventeenth year of "the reign of our said Lord the King, at the parish of *the* "*Holy Trinity*, in the city and county of the city aforesaid, "unlawfully, fraudulently and deceitfully, did cause and "procure himself, without the consent of his master, the "said *William Lucas*, to be inlisted into the said seventh "regiment of foot as a soldier. By means whereof he the "said *Joseph Jones* did unlawfully, fraudulently and de-"ceitfully receive and obtain of and from the Paymaster "of the said regiment divers sums of money, amounting in "the whole to the sum of three pounds eight shillings; he "the said *Joseph Jones*, at the time of his inlisting into the "said regiment and during his continuance therein, then "and there well knowing himself to be by the laws of this

" realm, without the consent of his master the said *William* " *Lucas*, disqualified from serving as a soldier in the said " seventh regiment of foot; to the great deceit, fraud, and " damage of our said Lord the King, in evil example of all " others, and against the peace of our said Lord the King, " his crown and dignity."

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JONES'S CASE.

THE facts of his inlisting, taking the money, and not only declaring but swearing that he was not an apprentice, were clearly proved; and to prove that he was disqualified, the master produced the indentures of apprenticeship, and claimed his apprentice. There were two subscribing witnesses to the execution of the indenture, but neither of them were produced, nor had any notice been given to the prisoner to produce his duplicate.

See the mutiny Act, 52 Geo. III. c. 22. s. 83. by which this offence is punishable with two years' hard labour in the House of Correction, and to serve as a soldier on the expiration of his indentures.

THE prisoner was convicted; but the case was reserved for the opinion of the TWELVE JUDGES, on a question, Whether, as the actual and legal binding was the fact which constituted the *gist* of the offence, the indenture should not have been proved by a subscribing witness?

THE JUDGES in Easter Term 1777, were unanimously of opinion, That the indenture ought to have been so proved, and that the conviction was bad.

THE KING *against* JAMES ELLIOT.

CASE XC.

JAMES ELLIOT was tried at *Maidstone* Assizes on 21st July 1777, for forging a BANK-NOTE, with the name of *Thomas Thompson* thereunto subscribed, purporting to bear date the 20th of June 1775, and to have been signed by one *Thomas Thompson*, for the Governor and Company of the Bank of England, for the payment of the sum of FIFTY POUNDS to Mr. *Joseph Crooke* or bearer, on demand; the tenor of which said Note is as followeth, *that is to say*,

A forged bank-note, although the word "*Pounds*" be omitted in the body of it, and there be no *water-mark* in the paper, is a *counterfeit* note for the payment of money. S. C. 2 East, 951.

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"No. 17. 73.—I PROMISE to pay to Mr. *Joseph Crooke* or "bearer, on demand, the sum of FIFTY "£. FIFTY. LONDON, *the 20th day of June* 1775. "For Govr. and Compy. of "ENTd. *C. Blewert.* "the Bank of England. "THO. THOMPSON."

THE second count charged it to be "*a certain note* in *the* "*form* of a bank-note." The third count charged it to be "a certain promissory note for the payment of money." There were also other counts, in which the offence was charged to have been committed with an intent to defraud the Governor and Company of the Bank of England.

THE fifth count, which was that on which the Counsel for the Crown relied, charged, "that the said *James Elliot*, on "the 14th June 1777, feloniously did make, forge and coun- "terfeit, and cause and procure to be falsely made, forged "and counterfeited, &c. *a certain promissory note for the* "*payment of money*, with the name of *Thomas Thompson* "thereunto subscribed, purporting to bear date, &c. and to "have been signed by one *Thomas Thompson* for the Go- "vernor and Company of the Bank of England, for the "payment of Fifty Pounds to *Mr. Joseph Crooke* or bearer, "on demand, the tenor of which &c. with intention to de- "fraud the Governor and Company of *Bank of England*;" this count was admitted to be framed on the 31 Geo. II. c. 22. s. 78. which extends the subjects of forgery, enumerated in the 2 Geo. II. c. 25. to all corporations.

IT appeared in evidence, that the prisoner had applied under the fictitious name of *Pearce* to one *Mary Smith*, who usually made the moulds for the Bank of England paper, to make him a pair of small moulds, finer than those which she made for the use of the Bank; but she refused to execute his order; that about two months previous to the finding of the indictment, the prisoner delivered to a Mr. *Robert Ryland*, a copper-plate printer, two copper-plates and a quantity of fine paper, desiring that he would strike off two dozen impressions from each plate by the next day, one of these plates being engraved for the sum of Twenty Pounds, the other for

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the sum of FIFTY POUNDS, both of them payable by the Govr. and Compa. of the Bank of England. Mr. *Ryland* struck off the impressions, pursuant to the order, and re-delivered them, with the plates, to the prisoner the next day at a public-house in Fleet Street. The prisoner was apprehended at *Dover* in the County of *Kent*, in which county the indictment was laid; and at the time of his apprehension impressions, of the above description, were found upon him, and produced in Court, together with the copper-plates, which had been found at an obscure lodging near Tower Hill, in consequence of information derived from the prisoner himself, who went there in custody of an officer, who broke open the chamber door, and took them out of a box directed for *William Pearce*. Among the printed impressions found *upon the person of the prisoner at the time he was apprehended, was the forged instrument stated in the indictment.* The plate from which it had been struck off was identified by Mr. *Ryland*; and the Officers of the Bank proved, that the note was in every respect both in paper and print similar to a bank-note, both in the written and printed parts of it, except, *first*, that the number was not filled up; *secondly*, that the word POUNDS was omitted in the body of the note; *thirdly*, that the texture of the paper was rather thicker than that used by the Bank; and *fourthly*, that in the fabrick of it, the water-mark, *viz.* the words BANK OF ENGLAND were not inserted: but they said, that a bank-note, with the like omission of the word POUNDS in the body of it, being regular in other respects, would be paid by the usage of the Bank, after it had passed the Examiner's office. A real bank-note, of the same date and tenor, except as above excepted, was produced in evidence. But no evidence was given to prove that the forged instrument was *forged* in the County of *Kent* in which the indictment was laid.

MORGAN, *the prisoner's counsel*, contended, *First*, That the word POUNDS being omitted in the body of the note, it was not a note for the payment of *money*; or if it was for the payment of money, it was totally uncertain what coin, whe-

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ther pounds or shillings, and that upon such an uncertainty in a declaration the plaintiff would be nonsuited.

To this objection it was answered, That the tenor of the note imported a promise to pay *some money* by a Company whose peculiar traffic is in cash, and whether for pounds or shillings would make no difference in the offence.

Secondly, THAT this was no forgery upon the corporation of the Bank of England, because *the water-mark* which was essential to the notes of the Company was omitted in the note, and therefore it was not a note resembling a Bank-note, and therefore could not be a fraud upon them.

To this it was answered, That whatever weight this objection might have upon the count for forging *a bank-note*, it had none upon the count charging it to be *a note for the payment of money*. It was clearly to be paid by that corporation, and a fraud upon them. A counterfeit need not be an exact counterpart. If made *malâ fide* so similar as to have an aptness to impose, it is sufficient. The water-mark is not of the essence of a bank-note, since the Company are not obliged by any law to use it. They may drop it or use it as they see occasion. It is sufficient that the tenor of the note imports a promise from the corporation of the Bank to pay. The case of a forgery by one *Vaughan*, tried at the Old Bailey in 1768, was cited, in which most of the letters of the water-mark were omitted in the substance of the paper; but as no authentic or accurate state of the case was produced, no stress was laid upon it.

THE learned Judge left it with the Jury to consider whether the word FIFTY imported POUNDS; and the Jury found the prisoner *Guilty* upon the count which charged him with forging "a certain promissory note for the *payment of money*, "with intention to defraud the Bank of England," and acquitted him of the rest of the indictment.

MORGAN, the prisoner's counsel, then moved the following objections in arrest of judgment:

First, IT is charged in the count upon which the prisoner

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is found *guilty*, to be a note for the payment of *money*, but in reciting the tenor of it it appears to be for the payment of FIFTY, and does not say POUNDS. The recital therefore materially varies from the charge, by leaving out a description of the coin, whether pounds or shillings, for which the note purports to be drawn, and no other coin can be considered as *money*.

Secondly, THAT it cannot be with an intention to defraud the Governor and Company of the Bank of England. The 31 Geo. II. c. 2. s. 78. whereon the count upon which he is convicted is grounded, relates, and the other statutes relate, to notes for the payment of money; but the tenor of the note set forth is not for the payment of money, and therefore not within them. The note produced in evidence appears intended to resemble a bank-note; but all bank-notes have the words BANK OF ENGLAND visible in the substance of the paper, and the count charges the intention to defraud the Bank. There is not the least appearance of the words BANK OF ENGLAND in the substance of the note, and therefore it does not resemble a note of that corporation.

IN Michaelmas Term 18 Geo. III. all the JUDGES except DE GREY Chief Justice of the Common Pleas, and SMYTHE C. B. being assembled at Symond's Inn, were unanimously of opinion, that the verdict was legal. For in forgery there need not be an exact resemblance; it is sufficient if the instrument is *prima facie* fitted to pass for a true instrument: and the majority of the Judges inclined to think that the omission of the word "Pounds" in the body of the note, had nothing else appeared, would not have exculpated the prisoner; but it was matter to be left to the Jury, as it was done, whether it purported to be a note for fifty *pounds* or any other sum. But all the Judges agreed that the "£ FIFTY" in the margin of it removed every doubt, and shewed that the FIFTY in the body of the note was intended for FIFTY *pounds*.

See Rex *v.* Hoost, Exeter Summer Assizes *coram* Le Blanc J. Acc. 2 East, 950.

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CASE XCI.

THE KING *against* JOHN HARRISON.

An entry, of the receipt of money or notes, made by a Cashier of the Bank of England, in THE BANK-BOOK of a creditor, is *an accountable receipt* for the payment of money within the 7 Geo. II. c. 22.; and altering the principal sum, by prefixing a figure to increase its numeration, is a capital forgery; but *that statute* did not extend to cases where *the offence* was committed with intent to defraud a corporation, until the 18 Geo. III. c. 18.

S. C. 2 East, 927, 988.

AT the Old Bailey in September Session 1777, *John Harrison* was tried before MR. JUSTICE BLACKSTONE upon an indictment framed on the statutes of 2 Geo. II. c. 25. 7 Geo. II. c. 22. and 31 Geo. II. c. 22. s. 78.

THE 2 Geo. II. c. 25. enacts, "That whoever shall falsely "make, forge or counterfeit, or shall cause or procure to be "falsely made, forged or counterfeited, or shall wilfully aid "or assist in falsely making, forging, or counterfeiting any "acquittance or *receipt*, either *for money* or goods, with in- "tention to defraud any *person* or *persons whatsoever*, or "shall, with the like intent, knowingly utter or publish the "same as true, shall suffer death without benefit of clergy."

THE 7 Geo. II. c. 22. enacts, "That whoever shall falsely "make, *alter*, forge, or counterfeit, &c. the number or *prin-* "*cipal sum* of any accountable receipt for *any note*, bill, or "other security for the payment of money, or any warrant or "order for the payment of money or delivery of goods, with "intention to defraud any *person* or *persons whatsoever*, or "shall, with the like intent, utter or publish the same as "true, shall suffer death without benefit of clergy."

THE 31 Geo. II. c. 22. s. 78. RECITES, "That whereas "doubts may arise whether the punishment inflicted by the "2 Geo. II. c. 25. extends to the commission of the like for- "geries with an intention to defraud any corporation," AND ENACTS, "That if any person shall forge, &c. *(inter alia)* "any acquittance or receipt, either for money or goods, with "intention to defraud any corporation, they shall suffer death "without clergy (*a*)."

See the indictment in Cro. Cir. Ass. 280.

THE indictment consisted of twenty-four counts. The first and second counts, framed on the statutes 2 Geo. II. c. 25. and 31 Geo. II. c. 22. s. 78. respectively charged the prisoner with forging and uttering a certain *receipt for money* purport-

(*a*) See 41 Geo. III. c. 39. by which the statutes 2 Geo. II. c. 25. 7 Geo. II. c. 22. and 31 Geo. II. c. 22. are altered and extended.

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HARRISON'S CASE.

ing to be a receipt given on the 16 June 1777, by one *John Clifford*, in the words, letters, figures, and cyphers following, *to wit*, " 1777, *June* 16. Bank-notes C. £.3210." with intention to defraud the corporation called *the London Assurance*. The third and fourth counts framed on the statute 7 Geo. II. c. 22. charged him with *altering* and uttering a certain *accountable receipt for Bank-notes for payment of money* (setting it out as before) *to wit*, the said sum of two hundred and ten pounds, by prefixing the figure 3 to the said figures and cypher 210, whereby the words, letters, figures and cypher " 1777, *June* 16. Bank-notes C. £.210," together with the figure 3, imported that *John Clifford*, a Clerk of the Bank of England, had received Bank-notes to the amount of 3210*l.* with intention to defraud *the London Assurance*. Four other counts charged the intention to defraud the Governor and Company of the Bank of England. Four others charged the intention to defraud the London Assurance *of houses and goods from fire*. And twelve others the same as the preceding, only that the year " 1777" was omitted therein.

See 2 East, C. L. 979, 980.

It appeared in evidence, that the London Assurance, to whom the prisoner was Accomptant, kept their cash with the Bank of England; for which purpose the Bank furnished the London Assurance with a book, the title of which is " Debt- " or, The Bank of England with the London Assurance, " Creditor." On the debtor side, the Clerk of the Bank, when any money or bank-note is sent to him, enters the date, and what it is that is paid in; then he signs his name, and afterwards writes the sum, putting a bar or dash before the figures in order to prevent another figure being prefixed or subjoined. When the London Assurance send for money, they send an order to the Cashier of the Bank to *write off* so much from their Bank-book. The Bank-book is in the custody of the Accomptant, and he sends it, with the *write-off*, by a confidential clerk; and upon producing it to the Cashiers of the Bank, they give him the money, and *write off* the sum paid in the book. On 16 June 1777, the Company paid into the Bank the sum of 210*l.* which was received by a Clerk

1777. of the name of *John Clifford* who made an entry in the book as follows, " 1777, *June* 16. Bank-notes C. £.210," to which sum the prisoner prefixed the figure 3 making thereby the sum received appear to have been 3210*l.*

HARRISON'S CASE.

THE fact of prefixing the figure, in the manner charged in the indictment, was proved by very full and satisfactory evidence; but it was objected that this was not a case within the statutes 2 Geo. II. c. 25. and 31 Geo. II. c. 22. s. 78. they being confined to the forgery of *receipts* for *money* or *goods*, and that as this was a charge of forging a receipt for *Bank-notes*, which were neither *money* nor *goods*, the counts framed on these statutes did not apply, and this objection being allowed the Jury found the prisoner *guilty* on the 3d, 4th, 7th, 8th, 11th and 12th counts, *viz.* on those counts which were framed on the statute 7 Geo. II. c. 22. and acquitted him of those on 2 Geo. II. c. 25. and he received sentence of death; but the sentence was respited, and the two following questions submitted to the consideration of THE TWELVE JUDGES:

FIRST, Whether the entry made by the Cashier in the Bank-book could be considered in law as an *accountable receipt for the payment of money*, within the meaning of the 7 Geo. II. c. 22?

SECONDLY, Whether that statute extends to the offence committed; the Jury having found the offence to have been committed with intent to defraud *a corporation*; and the statute 31 Geo. II. c. 22. s. 78. which extends the 2 Geo. II. c. 25. to corporations, being entirely silent with respect to the offences described in 7 Geo. II. c. 22. on which statute alone the counts were framed on which the prisoner was found guilty?

THE JUDGES were clearly of opinion, on the first point, that an entry in a Bank-book is *an accountable receipt* within the meaning of the Act; but no opinion was publicly given: As to the second point, it was further reserved, and a day was appointed for HOWARTH to argue it before THE TWELVE

JUDGES at *Serjeants'-Inn*, but no argument took place, and the prisoner was some time after pardoned (*a*). 1777.

HARRISON'S CASE.

(*a*) It seems that upon this point the Judges decided in favour of the prisoner, 2 East, C. L. 988. But the legislature, by 18 Geo. III. c. 18. has now removed all doubt upon this question, by enacting, That persons guilty of the several species of forgery mentioned in the statute 7 Geo. II. c. 22. with intention to defraud any corporation whatsoever, shall suffer death as felons, without benefit of clergy.—See also the statutes 41 Geo. III. c. 39. and 45 Geo. III. c. 89.

THE KING *against* FRANCIS MERCIER.

CASE XCII.

AT the Old Bailey in December Session, 1777, *Francis Mercier*, otherwise *Louis Le Butte*, was tried before MR. JUSTICE ASTON, present MR. BARON HOTHAM, and MR. SERJEANT GLYNN, Recorder, for the wilful murder of *David Samuel Mondrey*, on the 12th day of October preceding. He was also charged on the Coroner's Inquisition with the said murder.

If a person indicted for felony *stand mute* upon his arraignment, the Court may direct the Sheriff to return a Jury *instanter* to try whether he stand mute obstinately, or by the visitation of God; and if they find that he stand obstinately mute, sentence may be passed without further enquiry.

THE prisoner, when put to the bar to be arraigned, was asked by the Clerk of the Arraigns, in the usual form, whether he was Guilty or Not Guilty; but instead of making any answer he stood mute.

THE COURT having in vain exhorted him to plead to the indictment and inquisition, directed the Sheriff to return a Jury *instanter*, to try whether he stood mute *through obstinacy or by the visitation of God*; and a Jury being returned accordingly, the following oath was administered to them:

See 4 Hawk. P. C. c. 30. s. 7.

"You shall diligently enquire, and true presentment make "for and on behalf of our Sovereign Lord the King, whe- "ther *Francis Mercier*, otherwise *Louis Le Butte*, the now "prisoner at the bar, being now here indicted for the wilful "murder of *David Samuel Mondrey*, stands mute fraudu- "lently, wilfully, and obstinately, or by the providence and "act of God according to your evidence and knowledge. "So help you God."

1777.

MERCIER'S CASE.

THE prisoner was a Frenchman; and it appeared by the evidence of *John Gretton*, Esq. the Magistrate, before whom his examination had been taken, when he was committed, that he had answered the Magistrate's questions to him in the English language; that he had received several letters from him, in his own hand-writing, in the English language, and that, in the opinion of Mr. *Gretton*, he understood and was able to speak English nearly as well as his native tongue. It also appeared on the oaths of two of the keeper's men who had attended him during his confinement, that he had spoken English very fluently to a Mr. *Redshaw*, for ten minutes the preceding evening; and that the very morning of his trial, one of the men, while attending to bring him up stairs to the Court, said to the persons who were conveying him, "You had better set him down on the bench as he cannot "stand," to which he answered, "*No; I cannot sit.*" This expression appearing to have been lowly muttered rather than articulately made, it was requested by one of the Jury that some medical person should examine, Whether he had not swallowed some drug or other poisonous article, which from the apparent infirmity of his health, might have deprived him of the power of utterance. Mr. *Ogle*, an eminent surgeon, happening to be in Court, was accordingly desired to examine the prisoner, which he did; and being sworn, deposed, that on his asking the prisoner several questions, he made no answer, but shook his head, and put his hand upon his breast; that his pulse was exceedingly low and quick; that his tongue was rather moister than is usual; that there was no swelling or any other injury whatever about the stomach or its region; but that it was impossible for him to form any certain opinion whether he was, or was not, capable of speaking.

THE COURT then told the Jury that the question they had to try upon this evidence was whether the prisoner stood mute wilfully, fraudulently and obstinately, or by the visitation of God?

THE Jury, after consulting together for some time, found that the prisoner stood mute fraudulently, wilfully, and obstinately, and not by the visitation of God.

1777.

MERCIER'S CASE.

By 12 Geo. III. c. 20. it is enacted, "That if any person, "being arraigned on any indictment, or appeal for felony, "or on any indictment for piracy, shall upon such arraign- "ment stand mute, or will not answer directly to the felony "or piracy, such person so standing mute as aforesaid, shall "be convicted of the felony or piracy charged in such indict- "ment or appeal, and the Court before whom he shall be so "arraigned, shall thereupon award judgment and execution "against such person in the same manner as if such person "had been convicted by verdict or confession, and such "judgment shall have all the same consequences in every re- "spect as a judgment on a conviction by verdict or confes- "sion."

MR. JUSTICE ASTON, (the Recorder not being then present,) immediately passed sentence of death upon the prisoner, pursuant to the statute 25 Geo. II. c. 37. and he was accordingly executed on the Monday following, and his body afterwards dissected and anatomized pursuant to such sentence (*a*).

(*a*) At the Summer Assizes for Wells, in 1792, a prisoner indicted for burglary stood obstinately mute and refused to plead, and sentence of death was passed upon him and he was executed.

1778.

CASE XCIII.

THE KING *against* LYON LYONS.

A house under repair, but not inhabited, is not the dwelling-house of the owner, though part of his property is deposited therein.

S. C. 2 East, 497.

AT the Old Bailey in January Session 1778, *Lyon Lyons* and *Thomas Miller* were tried before MR. SERJEANT GLYNN, Recorder, for burglariously breaking and entering the dwelling-house of *Edward Smith*, with intention to commit a felony.

THE Jury found a general verdict *Guilty*, subject to the opinion of the JUDGES, upon the following case:

MR. SMITH had some time before purchased this house with an intention to reside in it, and had moved some of his

1778.

LYONS'S CASE.

effects, to the value of about ten pounds into the house (*a*); but at the time the offence was supposed to have been committed, it was under the care of a carpenter, for the purpose of being repaired; and Mr. *Smith* had not himself entered into possession of any part of it, nor did any part of his family, or any person whatever sleep therein. The prisoners broke and entered this house in the night-time, with an intention to steal; but whether it can in construction of law be considered the dwelling-house of *Edward Smith*, they submitted, &c.

THIS Case was made upon the objection of Mr. *Howarth*, the prisoner's Counsel; and a copy of it was delivered to each of the JUDGES named in the margin (1).

(1) Ld. Mansfield, L. C. J. De Grey, L. C. B. Skinner, Mr. J. Blackstone, Mr. J. Ashhurst, Mr. J. Nares, Mr. J. Gould, Mr. J. Willes,

THE JUDGES in Easter Term 1778, were of opinion, That a house so situated could not be considered as a dwelling-house, it being completely uninhabited, and therefore there could be no burglary.

THE judgment against the prisoners was accordingly arrested (*b*).

Mr. B. Perryn, Mr. B. Hotham, Mr. B. Eyre.

(*a*) It appears by Mr. East's report of this case, that no goods were in the house at the time it was broken open; and that the Judges were therefore also of opinion that it was no burglary, because as the indictment only charged an intent to steal, it must mean to steal the goods then and there being, and nothing being in the house, nothing could be stolen: But it is further stated that "it also seemed to be the sense of the Judges, and Eyre B. declared it to be his opinion, that although some goods might have been put into the house, which is the case put in Kelynge 46 and there doubted; yet if neither the party nor any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed." And this point appears to have been ruled accordingly by Buller J. in Hallard's Case, Exeter Spring Assizes 1792, 2 East, 498; by Grose J. in Thompson's Case at Kingston 1796, and adjudged by all the Judges in the Case of Davis, at the Old Bailey June Session 1800, *post*, Harris' Case, Old Bailey, October 1795, *post*, and Norreg Thompson's Case, *post*, Surry Assize 1796.

(*b*) In December Session 1782, *William Fuller* was indicted at the Old Bailey, before MR. RECORDER, for a burglary in the dwelling-house of *Henry Holland*.—The house was new built, and finished in every respect except the painting, glazing, and the flooring of one garret; a workman

who was *constantly* employed by Mr. *Holland*, the builder, slept in it for the purpose of protecting it; but no part of Mr. *Holland*'s domestic family had yet taken possession of the house; and THE COURT, upon the authority of *Lyons*'s *Case*, held, that it was not the *dwelling-house* of the prosecutor. 1778. LYONS'S CASE.

THE KING *against* THOMAS TICKNER. CASE XCIV.

On an indictment of *Mayhem* on the 22 & 23 Car. II. c. 1. the malice, and *lying in wait*, must be expressly proved. S. C. 1 East, 398.

AT the Old Bailey in February Session 1778, *Thomas Tickner* and *Thomas Adams* were tried before MR. JUSTICE GOULD, present MR. JUSTICE ASHHURST, and MR. BARON PERRYN, on the statute 22 and 23 Car. II. c. 1. commonly called *the Coventry Act*; *Thomas Tickner*, for making an assault on *William Jacob* with a bill-hook, and slitting his nose, with intention in so doing to maim and disfigure the said *William*; and *Thomas Adams*, for being present, aiding and abetting in the said felony.

See Coke and Wooburn's Case, 6 St. Tr. 212.

THE prosecutor was servant to a Mr. *Cole* of Twickenham, within about a quarter of a mile of whose house the prisoner lived. About twelve o'clock at night, on the 16th January 1778, the prosecutor discovered the prisoners in a field belonging to his master, where *Tickner* was pulling up turnips. The prosecutor went up to *Tickner*, and spoke to him; but instead of making any reply, *Tickner* immediately struck him on the nose with a sharp instrument fixed into a stick of wood, and hanging loose, something like a flail. The blow knocked him to the ground, and he received several blows after he was down, which rendered him senseless for some time. He was carried to St. George's Hospital, and upon examination a small superficial wound was found upon the right side of his nose; a very large wound upon his neck, immediately under the lower jaw; a cut upon his hand; a small incision on the right brow; and eight cut wounds on the top of his head; the cut upon the nose had divided the *exteguments* of the nose in an oblique direction; but did not go through the bones of the nostril. There is very little covering to the bones of the nose, except the skin; and the cut went to the

See Cro. Cir. Ass. p. 219. Lee's Case, *ante*, p. 51.

1778.

TICKNER'S CASE.

bone, but did not penetrate into the nostril. It was a cut; not a scratch or a slit; it went through the skin, and reached the bone; and it was sufficient to leave a mark visible for a long time.

THE evidence did not sufficiently affect the prisoner *Adams* to put him upon his defence; but MR. JUSTICE GOULD (present MR. JUSTICE ASHHURST, and MR. BARON PERRYN) told the Jury that he thought it was not necessary that either the malice aforethought or the lying in wait should be expressly proved to be on purpose to maim or disfigure the person injured. The prisoner was engaged in a criminal matter (1); prepared with a weapon to defend himself against all opposers; and being thus ready to support himself in his unlawful design of stealing the turnips, he is answerable for the consequences which happened in the prosecution of his illegal act. As to the slitting of the nose, the learned Judge said, it had been adjudged in the case of *Mr. Kirby*, (2), that a separating of the flesh was sufficient to bring the offender within the meaning of the Act of Parliament, and that in the present case the cut had reached the bone. He therefore left it with them to consider whether from the time of night at which the offence was committed, and the sort of weapon with which the offender had armed himself, they were satisfied that it was his determination to maim or destroy any person who should obstruct him in the act of stealing the turnips.

(1) See 13 Geo. III. c. 32. by which stealing turnips is made a *misdemeanor*.

(2) This is Barney Carrol's Case, *ante*, p. 55.

THE Jury found the prisoner guilty; but on his receiving judgment, MR. SERJEANT GLYNN, Recorder, ordered the execution of the sentence to be respited, until the opinion of THE TWELVE JUDGES could be procured, Whether this conviction was proper within the meaning of the statute? the words of which are, "That if any person shall on purpose, "and of malice aforethought and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, *slit* "*the nose*, cut off a nose or lip, or cut off or disable any "limb or member, of any subject of his Majesty, with intention in so doing to maim or disfigure, in any the matters above-mentioned, such his Majesty's subject; the person so offending, his counsellors, aiders, and abettors,

See 43 Geo. III. c. 58.

" knowing of and privy to the offence as aforesaid, shall be " felons, and suffer death without the benefit of clergy."

1778.

TICKNER'S CASE.

THE JUDGES were of opinion, that the conviction was wrong; for that this did not amount to a sufficient evidence of lying in wait (*a*).

(*a*) See *Thomas Mills's* Case, *post*, April Session, 1783, and the case of Alexander Mackey, Kingston Spring Assizes 1778, 1 East's P. C. 899, where the commander of a press-gang, maiming a man whom he casually met, and who resisted being impressed (being in truth no mariner) but against whom he appeared to have an antecedent grudge, was held not a lying in wait within this statute.

THE KING *against* ROWLAND RIDGELAY. CASE XCV.

What shall be considered *a puncheon* within the meaning of 8 & 9 Will. III. c. 26.

S. C. 1 East, 171.

See Lennard's Case, Taunton Assizes, 1772, *ante*, page 90, case 51.

THIS was a case upon the 8 and 9 Will. III. c. 26. drawn up and reserved by MR. BARON HOTHAM, at the Old Bailey in December Session 1778, for the consideration of THE TWELVE JUDGES.

THE indictment *first* counted, That the prisoner not being a person employed in or for the Mint, &c. knowingly, feloniously, and traitorously had in his custody and possession one PUNCHEON, made of iron and steel, in and upon which was *made and impressed* the figure, resemblance, and similitude of the head side of a SHILLING, without any lawful authority or sufficient excuse for that purpose, against the duty of his allegiance, &c.

The *third* count was the same as the first, for having in his possession a puncheon, in and upon which was impressed the figure, resemblance, and similitude of the head side of a GUINEA.

THE *second* and *fourth* counts respectively charged, that the said puncheon would *impress and make* the figure, resemblance, and similitude of the head side of *a shilling* and *a guinea*.

THE words of the Act of Parliament, as far as they relate

1778. to this question, are, that whosoever "shall knowingly make
"or mend, or begin, or proceed to make or mend, or assist
RIDGELAY'S CASE. "in the making or mending of any puncheon, counter-
"puncheon, matrix, stamp, die, pattern, or mould, of steel,
"iron, silver, or other metal or metals, or of spaud, or of
"fine founder's earth, or sand, or of any other materials
"whatsoever, in or upon which there shall be, or be made
"or impressed, or which will make or impress, the figure,
"stamp, resemblance, or similitude of both or either of the
"sides or flats of any gold or silver coin current within this
"kingdom, &c. or shall knowingly buy, sell, hide, or con-
"ceal, or without lawful authority or sufficient excuse for
"that purpose, knowingly have in his, her, or their houses,
"custody, or possession, any such puncheon, counter-
"puncheon, matrix, stamp, die, or other tool or instru-
"ment before-mentioned, every such offender or offenders,
"their counsellors, procurers, aiders, and abettors, shall be
"guilty of high treason."

It was fully proved that the puncheons were found in the prisoner's lodgings, together with a quantity of bad money, and that he had them knowingly for the purposes of coining; and the Jury were inclined to find only a verdict that "the said puncheons were knowingly in his custody;" submitting to the Court whether the proof of such puncheon being so found satisfied the words of the Act; but a general verdict *Guilty* was taken; and as no case had been decided upon this branch of the Act, the officers of the Mint wished to have the opinion of the Judges upon the following evidence of the Engraver of the Mint, Whether this was or was not a puncheon within the meaning of the legislature?

It appeared by the evidence of the Engraver of the Mint that the puncheons found in the prisoner's custody were complete, and hardened ready for use; but it was impossible to say, that the shillings which were found, were actually made with these puncheons, the impressions being too faint to be exactly compared; but that they had the appearance of having been made with them: that the manner of making these

1778.

KIDGELAY'S CASE.

puncheons is as follows: A true shilling is cut away to the outline of the head; that outline is fixed on a piece of steel, which is filed or cut close to the outline; and this makes the puncheon; that the puncheon makes the die, which is the counter-puncheon; that a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never so made at the Mint; but after the die is struck, the letters are engraved on it; that a puncheon alone without the counter-puncheon will not make the figure; but to make an old shilling, or a base shilling current, nothing more is necessary than the instrument now produced. They may be used for other purposes, such as making seals, buttons, medals, or other things, where such impressions are wanted.

On the first day of Hilary Term 1779, Eleven of the Judges (*absente* L. C. J. De Grey) were unanimously of opinion, That this was *a puncheon* within the meaning of the Act, for the word "puncheon" is expressly mentioned in the statutes, and will by the means of the counter-puncheon or matrix "make or impress the *figure, stamp, resemblance or si-*"*militude of the current coin*" and these words do not mean an exact figure, but if the instrument impress a resemblance in fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the Act would be quite evaded; for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, though the letters are worn out, are current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case mentioned by *Sir Matthew Hale* (*a*), that the omission or addition of words in the inscription of the true seals for the purpose of evading the law, would not alter the case. At the February Session following the prisoner received judgment of high treason.

(*a*) 1 Hale, 184. 2 Hale, 212, 215. Robinson's case, 2 Roll. Rep. 50. 1 East's Pleas Crown, 86.

1779.

CASE XCVI.

THE KING *against* MAY.

The words "*in manner and form following, that is to say,*" do not bind the party to recite the instrument, &c. *verbatim.*

AT the Sittings at Westminster in Hilary Term 1779, before MR. JUSTICE BULLER, the defendant was tried on an indictment for PERJURY in his evidence as the prosecutor of an indictment against *A.* for an assault. The indictment for the assault charged, that the prosecutor had received an injury, "*whereby his life was greatly despaired of.*" The indictment for *the perjury* introduced the indictment for *the assault* in these words, "which indictment was presented "*in manner and form following, that is to say,*" and then set forth the indictment at length; but in reciting the passage above-mentioned, the word "*despaired*" was omitted.

THE Counsel for the defendant admitted, that it was not necessary to have recited the indictment for the assault; but it was contended, that the prosecutor by the words "*in manner and form following, that is to say,*" had undertaken to recite it; and that having so done, he was bound to set it forth *verbatim.*

BUT the learned Judge over-ruled the objection. He said, that the word "*tenor*" had so strict and technical a meaning as to make a literal recital necessary (1); but that by the words "*in manner and form following, that is to say* (2)," nothing more is requisite than a substantial recital: the variance therefore in the present case was only matter *of form*, and did not vitiate the indictment. He mentioned also a case where the variance was "*undertood,*" in the recital of an affidavit in an indictment, instead of "*understood;*" in which though the introductory words were, *to the tenor and effect following, &c.* the Court determined that the variance was not fatal (3).

(1) The word "*aforesaid*" implies and binds the party to an exact recital. Boyce *v.* Whitaker, Douglas 97.

(2) See the King *v.* Powel, *ante*, p. 77.

(3) See the King *v.* Beech, *ante*, p. 13.

THE defendant was convicted; and on motion to the Court of King's Bench a rule was granted, on the ground of this variance, to shew cause why the verdict should not be set aside, and a judgment of acquittal entered: but it was after-

wards dropped without argument: and in the Easter Term following the defendant was called upon his recognizance, in order that judgment might be pronounced against him. 1779.

THE KING *against* DONNALLY. CASE XCVII.

To obtain money from a person against his will, by threatening to carry him before a magistrate and to accuse him of unnatural practices, amounts to the crime of ROBBERY, though no actual or *personal violence* be used. S. C. 2 East, 713, 715, 783.

AT the Old Bailey in February Session 1779, *James* ALIAS *Patrick Donnally* was tried before MR. JUSTICE BULLER, and found guilty of having committed two several highway robberies upon the person of the Honourable *Charles Fielding*, Esq. son of the Earl of *Denbigh*. But the judgment was respited, and the following case submitted to the opinion of the JUDGES.

CASE. On the 18th January 1779, the prosecutor Mr. *Charles Fielding* dined at Mrs. *Cotton*'s in Harley-street, Cavendish-square. As he was returning through Soho-square towards the Playhouse, between the hours of six and seven o'clock in the evening, he met the prisoner, whom he had never seen before. The prisoner accosted Mr. *Fielding* and desired that he would give him a present. Mr. *Fielding* asked, "For what?" The prisoner answered, "*You had* "*better comply, or I will take you before a Magistrate, and* "*accuse you of an attempt to commit an unnatural crime!*" Mr. *Fielding* then gave him half a guinea, which the prisoner said was not sufficient (*a*); but Mr. *Fielding* had no more in his pocket. On the 20th January about four o'clock in the evening Mr. *Fielding* met the prisoner again in Oxford-street, who made use of the same threats as before; telling him that

(*a*) It was decided in the case of Jackson and Shipley, Nottingham Spring Assizes 1802, before MR. BARON GRAHAM, on a case reserved, that to constitute robbery by taking money from another upon a threat to charge him with an unnatural crime, the money must be taken *immediately* upon the threat made, and not after the parties have separated, and time for the prosecutor to deliberate and procure assistance, and especially after he had consulted a friend, who was even present at the time when the money was paid, though the prosecutor parted with his money from fear of losing his character. 1 East, Addenda, xxi.

1779. DONNALLY'S CASE.

he knew what had passed in Soho-square; and unless he would give him more money, he would take him before a Magistrate and accuse him of the same attempt; adding that it would go hard against him unless he could prove an *alibi*. Mr. *Fielding* then went to the shop of Mr. *Walter*, a grocer in Old Bond-street; the prisoner following him, and staying on the outside of the door. When Mr. *Fielding* went into the shop, he took a guinea out of his pocket, gave it to Mr. *Walter*, and desired he would give it to the man at the door, which Mr. *Fielding* saw him do, and then the prisoner went away. Mr. *Fielding* said, that he was exceedingly alarmed at both the times, and *under that alarm gave the money*; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life.

THE Jury were desired to consider, FIRST, Whether they were satisfied that Mr. *Fielding* delivered his money through fear, and under an apprehension that his life was in danger? SECONDLY, If they should not think that Mr. *Fielding* apprehended his life was in danger, Whether the money was not obtained by means of the prisoner's threats, and against the will of Mr. *Fielding*, for if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery.

THE Jury found the prisoner guilty; and said they were satisfied that Mr. *Fielding* delivered his money through fear, and under an apprehension that his life was in danger.

THE question is, Whether this amounts in law to A ROBBERY? *Signed*, F. BULLER.

19th Feb. 1779.

ON the 29th April following, the TWELVE JUDGES assembled at L. C. J. DE GREY's house in Lincoln's-Inn Fields, for the purpose of hearing Counsel upon this case. It was argued by Mr. *Howarth* for the Crown, and by Mr. *Graham* for the prisoner. The Counsel for the Crown spoke first, and afterwards replied to the arguments by the Counsel for the prisoner. The Counsel then withdrew, and the JUDGES de-

1779.

DONNALLY'S CASE.

bated the point among themselves, and then gave their several opinions, beginning with the junior Judge (*a*).

At the ensuing May Session at the Old Bailey, Mr. Justice Willes delivered the result of their deliberations to the following effect:

The question submitted to the Judges was, "Whether "this offence amounts to a robbery?" This question has been argued by Counsel, both for the prisoner and for the Crown. The twelve Judges have investigated the subject, and delivered their sentiments *seriatim*; and they are unanimously of opinion, That the prisoner at the bar is guilty of the crime of which he has been convicted. The grounds and principles upon which this determination is formed, I shall endeavour to state to the Court with equal brevity and perspicuity.

The definition of robbery, as it is given by Sir *William Staundforde*, Sir *Matthew Hale*, and Mr. Serjeant *Hawkins*, is "a felonious and violent taking of *any* money or goods "from the person of another, putting him in fear;" from which it is evident, that to constitute the crime of robbery, three ingredients are necessary: First, a felonious intent, or *animus furandi*: Secondly, some degree of violence, or putting in fear: and Thirdly, a taking from the person of another. But as the Judges declared, they did not mean to draw the exact line what should or what should not be construed a robbery, but that every case must depend on its own particular circumstances, it will be sufficient for me to shew that the facts proved in the present case, are within the definition I have given of that offence.

First, The felonious intent, or *animus furandi*. The prisoner, a stranger to Mr. *Fielding*, stops him in the street, during the dusk of the evening, and desires that he would give him a present; and when he is asked, "For what?" he replies, "You had better comply, or I will take you before "a Magistrate (*b*), and accuse you of an attempt to commit an

(*a*) See the opinion of the Judges stated at large. 2 East, P. C. 716, 726.
(*b*) But see the Case of James Knewland and Nathaniel Wood, *post*, Old Bailey January Session, 1796.

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DONNALLY'S CASE.

"unnatural crime." This conduct will not bear two constructions. It is clear that he laid in the way for the purpose of obtaining money against the will of Mr. *Fielding*; and wherever one man obtains property from the possession of another *against his will*, the law presumes the act to proceed from a felonious intention, unless the circumstances under which it was done evince the contrary; for the security of private property is the care of the law, and the presumptions which it raises to attain that end, cannot be repelled by even a specious pretence of right; much less in the present case, where the baseness of the design is apparent. Nor will the law suffer its object to be evaded by an ambiguity of expression; for if a man *animo furandi* say, "Give me your money "—Lend me your money—Make me a present of your "money," or words of the like import, they are equivalent to the most positive order or demand; and if any thing be obtained in consequence, it will form the first ingredient in the crime of robbery (*a*).

THE *second* point considered was, Whether the prisoner had used that degree of violence, or inspired that degree of fear, which the law holds necessary to constitute this offence. In the definition above-mentioned, these two words are included as descriptive of the cause and the effect; but the law does not in this case require an *actual violence* upon the person, or an existing fear in the mind. A man with a cutlass under his arm, or a pistol in his hand, demands and obtains the money of another without touching his person. Here no actual violence is used. "Suppose," says MR. JUSTICE FOSTER, p. 128. "the true man is knocked down, "without any previous warning to awaken his fears, and lieth "totally insensible while the thief rifles his pockets; where "is the circumstance of existing fear?" And yet in both these cases the crime would be robbery. The putting in fear need not be laid in an indictment for this offence, nor

(*a*) See Merriman *v.* the Hundred of Chippenham, 2 East, P. C. 709. Taplin's Case, Old Bailey, June 1780, 2 East, 712. Spencer's Case, York Summer Assizes, 1783, 2 East, 713.

1779.

DONNALLY'S CASE.

the fact of fear proved upon the trial; but if it be laid to be done violently and against the will, the law *in odium spoliatoris* will presume it. It is not even necessary that there should be *actual danger;* for a robbery may be committed without using an offensive weapon; as by using a tinderbox or a candlestick instead of a pistol. A reasonable *fear of danger*, caused by the exercise of a *constructive violence*, is sufficient; and where such a terror is impressed upon the mind as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be said to part with it *against his will.* Nor need the degree of constructive violence be such, as in its effects necessarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go; and "if the fact be attended with those circumstances "of terror and violence, which in common experience are "likely to induce a man to part with his property for the "safety of his person," it is all the law requires. Sir *Matthew Hale*, 532. cites a case from the Year-Books of Edward the Third (1), which carries this doctrine still farther. "If "thieves come to rob a man, and finding little about him, "enforce him by menace of death to swear on a book to "fetch them a greater sum, which he doth accordingly, this "is a taking by robbery (2):" and yet when he fetches the money, he is removed from all terror but the fear of breaking his oath, and is out of the reach of violence (*a*).

Foster, 128.

(1) 44 Edw. III. f. 14. 4 Hen. IV. f. 2. a. Co. P. C. 68.

(2) Staundforde, 276.

But let us see how far the circumstances of the present case, will bring it within these rules of law. A young gentleman from school is accosted at night in London streets by a person he never saw before, whom he must suspect to be a villain. The stranger *demands* a present. This conduct seems sufficient to satisfy the legal idea of robbery. But the prisoner goes farther, and says, "You had better "comply, or I will take you before a Magistrate." This is a threat of *personal violence*, for the prosecutor had every

(*a*) *Sed vide* the case of Jackson and Shipley, 1 East, *addenda*, 21, and *ante*, page 193, *notis.*

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DONNALLY'S CASE.

thing to fear in being dragged through the streets as a culprit charged with an unnatural crime. The threat must necessarily and unavoidably impart intimidation. It is equivalent to actual violence; for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money. The menace is much stronger than that in *Harman's Case* (*a*), and it is implied, that if the violence in that case had preceded the theft, it would have been robbery. What can operate more powerfully on the mind than a menace to do that, which, in its consequences, would blast the fairest fame, and ruin for ever the brightest character? It is much more likely that such menaces should occasion fear, than those which MR. SERJEANT HAWKINS has mentioned in his Pleas of the Crown (1). That is a reasonable fear, which might operate *in constantem virum* as well as *in meticulosum virum*. It was argued by the prisoner's Counsel, that this was a *fraudulent extorting*, and not a *taking by violence*; but in many cases fraud will supply the want of violence; as in the case of burglary, where the breaking is necessary to be laid in the indictment: and yet if a person fraudulently get admission into a house by colour of law, or under pretence of taking lodgings, or of having business, it has frequently been held, that such circumstances amount to a constructive breaking. Several of the JUDGES thought there was a great analogy between these cases and the present, and therefore that it ought to be governed by the like principles. Where burglary is committed under

(1) 1 Hawk. P.C. 149, 161.

(*a*) *Harman* was indicted for robbing *Halfpenny* on the highway: It appeared in evidence, that *Harman* was upon his horse, and required *Halfpenny* to open a gap for him; and while he was so doing, *Harman* came by him, and slipped his hand into his pocket and took out his purse; *Halfpenny* not suspecting the taking of his purse, until turning his eye, he saw it in *Harman's* hand, then demanded it. *Harman* answered him, "*Villain! if thou speakest of thy purse, I will pluck thy house over thine ears, and drive thee out of the country as I did John Somers,*" and then went away with his purse; and because he took it not with violence, or put *Halfpenny* in fear, it was ruled to be but stealth, and not robbery; for the words of menace were used after the taking of the purse, wherefore he was found guilty only of larceny, and had his clergy. Hilary, 17 Jac. II. Roll. Rep. 154. 1 Hale, 534.

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DONNALLY'S CASE.

such circumstances, there is no *actual breaking*; and there is no *actual violence* in the present case; yet the fraud used in both amounts to a *constructive breaking* in one case, and to a *constructive violence* in the other; but the determination did not turn entirely upon this reasoning.

As to the *third* point, *viz.* a taking from the person, the JUDGES are of opinion, That it is impossible to raise a doubt upon the point; for that a taking in the presence of the party would have been sufficient, but that here was an immediate taking from his person.

BUT before I conclude, it may be proper to state the several authorities by which this determination of the JUDGES is supported. The *first case* mentioned was that of *James Brown*, who was tried and convicted at the Old Bailey in October 1763, for a highway robbery on *Ralph Hudson*; and he was executed. The second case was that of *Thomas Jones* (1), tried and convicted before MR. BARON HOTHAM, in February Session 1776; and his case was determined to be a robbery by all the JUDGES at Serjeants'-Inn Hall; and he was executed. The third case was that of *Robert Harrold*, in last June Session, who was tried and convicted of the like charge; but he was afterwards reprieved upon some doubt on the evidence. In all these three cases there was this difference from the present case, that some actual violence was proved, as *taking and seizing by the arm or collar.*—But the JUDGES all held, that this circumstance did not make any material distinction; but that sufficient was proved in this case for the Jury to find the prisoner guilty of ROBBERY.

(1) *Ante*, page 139, Case 75. See Daniel Hickman's Case, *post*, Old Bailey July Session, 1783.

THE KING *against* BRASIER.

CASE XCVIII.

An infant witness under *seven years* of age, if apprized of the nature of an oath, must be sworn; for no testimony is legal except it be given upon oath. S. C. 1 East, 443. S. C. Bull. N. P. 293. edit. 1790.

THIS was a case reserved for the opinion of the TWELVE JUDGES, by MR. JUSTICE BULLER, at the Spring Assizes for Reading, in the year 1779, on the trial of an indictment

1779. for an assault with intent to commit a rape on the body of *Mary Harris*, an infant under seven years of age.

BRASIER'S CASE.

THE case against the prisoner was proved by the mother of the child, and by another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury which had been done to her: and there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place which she had described, and that she had received some hurt, and that she, on seeing him the next day, had declared that he was the man; but she was not sworn or produced as a witness on the trial.

Dyer, 303b. 1 Hale, 302, 634. 2 Hale, 279. 11 Mod. 228. 1 Atkins, 29. Foster, 70. 2 Hawk. 612. Gilb. L. E. 144.

THE prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in *Dyer's Reports*; for these notes having been made by LORD CHIEF JUSTICE TREBY, are considered of great weight and authority; and it was submitted to the TWELVE JUDGES, Whether this evidence was sufficient in point of law?

THE JUDGES assembled at Serjeants'-Inn Hall 29 April 1779, were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath (*a*), for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received. The JUDGES determined, therefore, that the evidence of the *information* which the infant had given to her mother and the other witness, ought not to have been received.—The prisoner received a pardon.

See the case of Rex *v.* Travers. 2 Strange, 700.

(*a*) See White's Case, *post*, Old Bailey October Session, 1786.

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THE KING *against* BURY.

CASE XCIX.

IN the King's Bench, Easter Term 19 Geo. III. a rule had been obtained to shew cause why an attachment should not issue against the defendant, who was Clerk of Assize on the Norfolk Circuit, for not obeying a writ of *Certiorari* to remove an indictment for murder, and a special verdict founded upon it (1). On shewing cause against this rule, it was insisted by the defendant's Counsel, that he had a right to retain the record till he should be paid his fees for drawing, ingrossing, &c. which the attorney for the prisoner had refused to do, on the ground of their being exorbitant.

A Clerk of Assize has not a lien upon the records in his custody for his fees; and if he draw an indictment with unnecessary prolixity, he may be ordered to pay the extraordinary expence.

(1) Borthwick's Case, Dougl. 197.

LORD MANSFIELD said, he should be very unwilling to determine that a Clerk of Assize has a lien on the records of the Court for his fees, for that he foresaw great inconvenience from such a doctrine. It was therefore referred to the Master: and on the Attorney for the prisoner undertaking to pay as much as he should report to be due, the record was returned into Court, and the rule for the attachment discharged (*a*).

(*a*) In the same Term the Court referred an indictment for perjury against *May*, which had been removed from *Hicks's Hall*, to the Master, to see what part of the record was unnecessary; and made an order that the Clerk of the Peace should pay the expence incurred by such unnecessary part.—N. B. It was drawn to an exorbitant length, by stating all the continuances on the former prosecution, &c. which is rendered unnecessary by the express words of the 23 Geo. II. c. 11. s. 1. 1 Mod. 249.

THE KING *against* HEDGES.

CASE C

AT the Old Bailey May Session 1779, the prisoner was indicted for stealing six light glazed window-sashes.

What shall be considered a fixture to the freehold.

THE window-frames from which they were taken were fixed into their proper places, but the sashes were neither hung nor

S. C. 2 East, 590, *notis*.

beaded in the frames, but were fastened in by laths nailed across the frames to prevent their falling out.

(1) Mr. Justice Willes, Mr. Baron Hotham, Mr. Serjeant Glynn.

THE COURT (1) held they were not fixed to the freehold.

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CASE CI.

THE KING *against* FEARSHIRE.

Parole evidence cannot be received of the information given before a Magistrate, either in felony or misdemeanor, unless evidence be given that it was not reduced into writing. See

AT the Sittings of the King's Bench in Middlesex after Trinity Term 1779, *John Fearshire* was tried before LORD MANSFIELD on an indictment for a misdemeanor.

THE Counsel for the prosecution attempted to give parole evidence of the information which had been given against the defendant before a Justice of the Peace, and on which the Justice had granted a warrant to apprehend the defendant.

Rex *v.* Jacobs, *post*, Old Bailey February Session, 1784.

DUNNING, for the defendant, objected to the admission of this evidence, on the ground, that as it was the duty of the Magistrate to take informations in writing, the presumption of law was, that he had taken the information in writing in the present case; and that as the written information, which was the best evidence, was not produced, no parole testimony could be admitted to supply the want of it.

See 1 and 2 Phil. & Mar. c. 13. s. 4. and 2 and 3 Phil. & Mar. c. 10.

THE Counsel for the Crown replied, That neither the practice of Magistrates, nor the statutes of Philip and Mary, required the information of witnesses to be taken in writing, except in cases of treason, felony, or very high and aggravated misdemeanors; and that in misdemeanors of light complexion, like the present, the constant practice was, to take the parole evidence of the witness upon oath, and to dispense with the form of reducing it into writing.

See Rex *v.* Jacobs.

LORD MANSFIELD.—It is the duty of the Magistrate to take all charges, of whatsoever nature, kind, or complexion they may be, *in writing*. In the present case parole testimony cannot, at any rate, be given of the subject-matter of

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FEARSHIRE'S CASE.

the information, unless it be previously shewn that the informant did not give his deposition on oath; and that his information was not reduced into writing. But I am of opinion, that, as it is the indispensable duty of every Justice of Peace to take the information in writing in all cases, the presumption is, that he has in this case done his duty, by taking it in writing, and therefore the parole evidence now offered ought not to be received.

THE parole testimony was accordingly rejected, and the defendant was acquitted in consequence of this objection.

THE APPRENTICES' CASE.

CASE CII

Easter Term, 1779.

MR. DUNNING, on the third of May 1779, moved the Court of King's Bench for a writ of *Habeas Corpus* to bring up two young men from *The Nore*, who had been impressed and put on board the tender lying at that place.

The Chief Justice of the King's Bench may grant his warrant to bring up the bodies of impressed *Apprentices*. See 2 and 3 Ann. c. 6. s. 15 and 17.

THE several affidavits on which the application was made, proved them to be *apprentices* working daily under their indentures in their respective trades, and in the employment of their masters.

LORD MANSFIELD.—The press-master has acted very improperly. Instead of granting you a *Habeas Corpus*, I shall, upon this occasion, go a shorter way to work, and grant you my warrant as Chief Justice for bringing them before me, they being clearly *apprentices* not liable to be impressed. I was not acquainted with this authority until some years ago. I discovered it in reading some old Law Books, and I went to LORD HARDWICKE and consulted him on it, and he agreed that it was in the power of this Court to grant a warrant in such case of an apprentice, and said that LORD CHIEF JUSTICE HOLT was of the same opinion, and that there were several precedents for it.

1779. AND his Lordship ordered the regular steps to be taken to obtain the warrant (*a*).

THE APPRENTICES' CASE.

(*a*) See Rex *v.* Reynolds, 6 Term Rep. 497. and Rex *v.* Edwards, 7 Term Rep. 745. in which the power of the Chief Justice upon this subject is recognized, and in which it is settled that *a master* cannot sue out an *Habeas Corpus* to bring up the body of his impressed apprentice; his remedy in such case being by civil action against the aggressor: but *the apprentice* himself may obtain the writ, though *the master* cannot.—Same point *ex parte* Lansdown, 5 East's Term Rep. 38.; and Eades *v.* Vaudeput, *ibid.* 39, *notis.*

CASE CIII.

THE KING *against* WILLIAM JONES.

In an indictment for forgery, the words "*purporting* to be a bank-note," mean that the instrument upon *the face of it* appears to be a bank-note; and the want of such appearance cannot be supplied by the representation of the party uttering it.

AT Chelmsford, 21st July, 1779, *William Jones*, otherwise *Thorowgood*, was indicted before LORD MANSFIELD, on the statute 15 Geo. II. c. 23. s. 11. for that he, having in his custody a certain forged *paper-writing*, *purporting* to be A BANK-NOTE (describing it) as followeth; *that is to say*,

"No. F. 946,

"I PROMISE to PAY John Wilson, Esq. OR BEARER, TEN "POUNDS. "London, March 4, 1776.

"£. Ten. "For Self and Company of my

"ENT^d. *John Jones.* "Bank in England."

* * *

S. C. Dougl. 302. S. C. 2 East, 983.

did dispose of and put away the said forged paper-writing as and for a good and true bank-note, well knowing the same to be forged. There were other counts charging it to be—FIRST, A certain forged and counterfeited note: SECONDLY, A forged *paper-writing*: and THIRDLY, a paper-writing *purporting* to be a *promissory note for payment of money*: and laying the offence to have been committed, *first*, with an intention to defraud the Bank of England; and *secondly*, with an intention to defraud *James Rayner*.

THE Jury acquitted the prisoner on those counts which charged an intent to defraud the *Bank of England*; and as

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JONES'S CASE.

to the other counts, they found a special verdict to the following effect: That the paper-writing set forth in the third count of the indictment, is not a note filled up by any of the officers of the Governor and Company of the Bank of England, nor entered in any of their books, but is forged: That the said *William Jones*, otherwise *Thorowgood*, well knowing the said paper-writing not to be a note of the Governor and Company of the Bank of England, but to be forged, averred the same paper-writing to be a good bank-note, and disposed of and put away the same as a good bank-note to *James Rayner*, with intent to defraud the said *James Rayner*; and that the said *James Rayner* took the said paper-writing, and gave the full value of Ten Pounds for the same to the said *William Jones*, otherwise *Thorowgood*, believing the said paper-writing to be a true bank-note: That the Governor and Company of the Bank of England frequently pay bank-notes which are filled up by their officers and entered in their books, although the same happen not to be signed. On the fourth count they also found the same as on the third count, only calling it as in that count *a note* instead of *a paper-writing*. On the SIXTH COUNT they found, That the paper-writing purporting to be a promissory note for the payment of money, is not a note filled up by any of the officers of the Bank of England, &c. (1) but is forged: That the said *William Jones*, otherwise *Thorowgood*, well knowing the said last mentioned paper-writing not to be a note of the Governor and Company of the Bank of England, but to be forged, *averred* that it was a good bank-note, and uttered and published it as a good bank-note to *James Rayner*, as above-mentioned. But whether, &c.

(1) This count was framed on 2 Geo. II. c. 25. and 31 Geo. II. c. 22. s. 77.

ON Wednesday, 24th November 1779, this special verdict was argued in the Court of King's Bench by *Fielding* on the part of the prosecution, and by *Mingay* on the part of the prisoner. And the question was, Whether this paper-writing purported to be *a bank-note?*

THE COURT were of opinion, That the representation which the prisoner had made to *Rayner*, *viz.* That it was a

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good bank-note, could not alter the *purport* of it (*a*), which is what appears upon the face of the instrument itself; for although such *false* representations might make the party guilty of a fraud or cheat, they could not make him guilty of felony.

THE prisoner was therefore discharged.

(*a*) Jones's crime was that of telling a falsehood. *Per* Mansfield, C. J. in REX *v.* Collicot, 4 Taunton 308, in the Exchequer Chamber, 23 April, 1812.

CASE CIV.

THE KING *against* MARY ADEY.

Quere, Whether a woman, who, in a transport of passion, kills a peace-officer who is about to take the man she cohabits with to prison, under a warrant which turns out to be illegal, is guilty of murder or manslaughter?

S. C. 1 East, 329.

AT the Old Bailey in September Session 1779, *Mary Adey* was tried before MR. BARON HOTHAM, present MR. JUSTICE GOULD and MR. JUSTICE ASHHURST, for the wilful murder of *William Barnet*, on the 31st July preceding.

THE evidence was in substance as follows: *William Barnet*, the deceased, was a kind of assistant at the Public Office in Bow-street. The prisoner *Mary Adey* lodged at one *Ward's*, a public-house in Castle-street, in Long Acre, and she and a man of the name of *Farmello*, who was married to another woman whom he had deserted, cohabited with each other in these apartments. In the same house lodged a woman of the name of *Stephens*. On the morning of the 31st July 1779, a quarrel happened between *Farmello* and *Mary Adey* and Mr. and Mrs. *Stephens*; during which, after much altercation, they proceeded to blows, and Mrs. *Stephens* went immediately to the Public Office in *Bow-street*, and applied to *William Barnet* to procure a warrant against *Farmello* and *Mary Adey* for the assault. *Barnet*, on hearing that *Farmello*, who was a journeyman shoemaker, was a married man living with another woman, told Mrs. *Stephens* that she could not have a warrant for the assault until six o'clock in the afternoon, but that if she was sure that *Farmello* was a married man, he was an object of the Act, meaning the statute 19 Geo. III. c. 10. and might be pressed. This statute which was made

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ADEY'S CASE.

" for the more easy and better recruiting of his Majesty's " land forces and marines," enables the Commissioners therein described " to raise and levy, and cause to be raised and " levied, within their several limits and jurisdictions, all able " bodied, idle and disorderly persons, who cannot upon ex- " amination prove themselves to exercise and industriously " follow some lawful trade or employment, or to have some " subsistence sufficient for their support and maintenance, to " serve his Majesty as soldiers, and to require and command " all and every high constables, churchwardens, overseers " of the poor, petty constables, headboroughs, and tithing- " men, and other parish and town officers, or any of them " within their respective limits and jurisdictions, to be aiding " and assisting to the said commissioners; and for that pur- " pose the commissioners or any three of them are to issue " out their warrants requiring such high constables, church- " wardens, &c. to make or cause to be made, a general " search within their respective parishes, &c. for all such " persons as they can find who are or shall appear to them " to be within the description of this Act, &c." But it is provided " that no bailiff's follower or assistant employed or " belonging to any sheriff, bailiff of liberties, marshalsea " court, *or any other person or persons that shall be so em-* " *ployed by any one that shall have the power of executing any* " *warrant or process whatsoever*, shall be deemed thereby to " follow or exercise any calling or employment, or to have " a sufficient support and maintenance within the intent and " meaning of this Act." A regular warrant had been granted under this Act by three commissioners to a man of the name of *David Prothero*, who was at this time constable of the parish of *St. Martin in the Fields*, in which parish the house in which *Mary Adey* lodged was situated; and *Barnet* the deceased having, as above related, heard Mrs. *Stephens*'s account of *Farmello*'s character, applied to *Prothero* about four o'clock in the afternoon of the same day requesting that he would go with him to *Castle-street* to impress a man who, he said, had been beating a woman until he had almost murdered her, and who was a loose, idle, and disorderly person

1779. within the meaning of the Act; and on Mrs. *Stephens* being called in and asserting these facts, *Prothero* and *Barnet* went with her to the public-house. When *Prothero* went into the passage of the house, he saw three men standing on the stairs, one of whom exclaimed, "*Here is the constable com-*"*ing up stairs to take him.*" *Prothero* begged that they would tell him which was *Farmello*'s door, which they did accordingly, and on his tapping at it with his hand, a man's voice within asked, "*Who is there?*" *Prothero* answered, "*It is me, open the door;*" a servant maid in an adjoining room said, "*You need not go in that way; you may go in* "*this way,*" shewing him, in the middle of the wainscot, a door which opened from the one room into the other. The husband of Mrs. *Stephens*, and a man of the name of *Ellis*, went and unbolted the door, the bolt being on their side of the door, and *Prothero*, after pushing the door open, entered the room; in the middle of which he saw *Farmello*, whom he had never known or ever seen before, standing straight before him, and *Mary Adey* sitting on his left hand. *Prothero* waved his finger, and said to *Farmello*, "*Come, my friend,* "*you must go along with me.*" *Farmello* replied, "*What* "*for?*" *Barnet*, who was at this time standing on the right-hand side of *Prothero*, exclaimed, before *Prothero* could answer *Farmello*'s question, "*Come, come, you must go.*" The prisoner, *Mary Adey*, immediately jumped up, came in front of *Prothero*, and made a blow at *Barnet*, saying, at the same time, "*Damn you, he shall not go;*" and upon her withdrawing her hand, a knife was observed sticking about three inches and a half below the armpit in *Barnet*'s body, who turned immediately out of the room, crying, "*O dear!* "*O dear! Lord have mercy upon me! I am killed!*" and he died of the wound he then received at four o'clock on the ensuing day. The prisoner in her defence said, that at the time *Barnet* entered the room she was sitting at the table eating her dinner with the knife in her hand.

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HOWARTH, in opening the case to the Jury, admitted that *Prothero*, whom the deceased must be taken to have been aiding and assisting, was not in the due execution of his of-

fice; for that although he was possessed of a warrant which authorized him to search for people of a certain description, *Farmello* was not a person within that description; but he contended, FIRST, that although *Prothero* and *Barnet* were not authorized to take *Farmello* under the warrant, they could only be considered as mere *trespassers*, by going unauthorized into *Farmello*'s room, for that at the time the mortal wound was given, no arrest had been made of his person, nor any provocation given to him, and that it was in law a decided case, that when a trespasser is found upon the land of another, and the owner of the land, with a dangerous weapon, likely from its nature to occasion death, gives the trespasser a blow with it which kills him, it discovers a propensity sufficiently atrocious and brutal to support the inference of preconceived malice, and make the homicide, in construction of law, murder. And, SECONDLY, that even if either *Prothero* or *Barnet* or both of them together, had proceeded so far upon this warrant, as to attempt the actual and personal arrest of *Farmello*, although it might, if *he* had immediately killed one or both of the persons who were thus endeavouring unlawfully to invade his personal liberty, have reduced his offence from murder to manslaughter, yet that this indulgence of the law could not in such a case be extended to a person with whom neither the officer or his assistant had any thing to do. The menace, if it can be so called, which *Barnet* made use of when he said, "*Come, come, you* "*must go,*" was addressed to *Farmello*, and not to *Mary Adey*, who was not the object of their warrant or search, who was not meant to be apprehended, who was a mere bye-stander, upon whom no attack had been made; and who therefore had no right to interfere. The provocation, if any, was given to *Farmello*. She had received no provocation whatever; and therefore she had no such excuse for her conduct, as will, in the eye of the law, reduce this homicide from the offence of murder to that of manslaughter.

MR. BARON HOTHAM. I should be exceedingly happy if I could in my conscience consider the circumstances of this case as amounting only to manslaughter; but this homicide

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having been committed by *Mary Adey*, makes it in my apprehension, a very different case from that which it would have been, if the mortal blow had been given by *Farmello* himself. If he, when the constables entered the room with an insufficient warrant, had immediately, in his own defence, rather than suffer himself to be impressed, done the deed which unfortunately terminated the life of *Barnet*, the homicide would have been lessened to the crime of manslaughter. The case also might have been of a different complexion in the eye of the law if *Mary Adey* had been the lawful wife of *Farmello;* but standing in the light she does, she must, notwithstanding her cohabitation with him, be considered as an absolute stranger, a mere stander by: a person who had no right to be concerned in any degree whatever for *Farmello.* She therefore being to all intents and purposes a stranger, and, having, before any person had been touched, when the officers had only required *Farmello* to go with them, without making use of any argument to induce them to desist, or saying one word to prevent the intended arrest, instantly stabbed the deceased, she is in my opinion guilty of murder. There are cases in which this doctrine has been heretofore considered, and doubts have been entertained upon the subject how far a mere stranger, or stander by, is at liberty to interfere in cases where the personal liberty of another is about to be invaded; I allude to the cases of *Hopkin Hugget* (1) and *the Queen* v. *Tooley* (2); but the circumstances of these cases were extremely different from those which form the present case.

(1) 1 Kely, 59. 1 Ld. Ray. 143.

(2) 11 Mod. 242. 2 Ld. Ray. 1296.

Mr. Justice Gould and Mr. Justice Ashhurst concurred in opinion with Mr. Baron Hotham; but the Court thought that as different opinions had been entertained respecting the law of the two cases above-mentioned (3), it was right, in a case where the life of a fellow-subject was at stake, that the case should undergo a more solemn enquiry, and advised the Jury to find *a special verdict:* But the Counsel for the prisoner suggesting to the Court that the Jury might perhaps think it amounted only to manslaughter, the case, under all its circumstances, was left to their con-

(3) Foster, C. L. 138, 313, 315.

sideration, and the Jury found the following special verdict, which was drawn up by the Counsel on each side.

THE Jurors find, That the deceased went, in company with one *David Prothero*, who was a constable of the parish of Saint Martin in the Fields, to the house of one *Ward*, in Castle-street, in that parish, in whose house the prisoner cohabited with a man of the name of *Farmello*; that *Prothero* went to the house of *Ward*, accompanied by *Barnet*, for the purpose of apprehending *Farmello* as an idle and disorderly person, under the statute of 19 Geo. III. c. 10; that *Prothero* had a general search-warrant for that purpose; that upon *Prothero*'s coming to the house of *Ward*, he, together with *Barnet* and others, went up stairs to the lodging-room of *Farmello*, in which *Farmello* and the prisoner cohabited at that time; that *Prothero* did not know *Farmello*; that *Prothero* knocked at the door, and demanded to be admitted; that a male voice called out from within, "Who's there?" that *Prothero* answered, "It is me:" upon which a servant-maid belonging to the house said, "there is another door by which you may enter," the bolt of which was on the inside of a room not belonging to *Farmello*'s lodgings; that this door was unbolted, and opened by two men of the name of *Ellis* and *Stephens*; that *Prothero* and *Barnet* then entered *Farmello*'s room; that *Prothero* said to *Farmello*, "You must "come along with us." *Farmello* said, "For what;" that *Barnet* said, "Come, come, you must go;" that before *Prothero* could answer *Farmello*, the prisoner stepped past *Prothero*, and struck *Barnet* under the left arm with a knife which she then had in her hand, saying, "By God, he shall not go;" that the knife was left sticking in the side of *Barnet*, who turned round, saying he was a dead man; that *Barnet* died of that wound about four o'clock the next day; and that *Farmello* was not an object of the said Act of Parliament.

THE QUESTION was, Whether the offence amounted to murder or manslaughter?

THIS case was argued in the Exchequer Chamber on the 19th April 1780, by HOWARTH for the Crown, and ERS-

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KINE for the prisoner, before ten of the Judges (1), and the cases in the note (*a*) were cited and relied on.

THE prisoner laid eighteen months in gaol, and was then discharged (*b*).

1) Ld. Mansfield, L. C. B. Skinner, Mr. J. Gould, Mr. J. Willes, Mr. J. Ashhurst, Mr. J. Buller, Mr. J. Nares, Mr. B. Eyre, Mr. B. Perryn, Mr. B. Hotham.

(*a*) The Queen *v.* Tooley, 2. Ld. Ray. 1296. Holt, 485. 11 Mod. 242. Huggin's Case, Fitzg. 177. 2. Strange, 882. 2. Ld. Ray. 1574. 9. State Trials, 112. Bucknal's Case, Styles 469. Mawgridge's Case, Kely. 136. Foster, 135. 312. 314. 1. Hale, 465.

(*b*) It is said, that the Judges held it to be manslaughter only; but no opinion was ever publicly given: and *quære*, whether the prisoner did not escape, pending the opinion of the Judges, when the gaol was burnt down in 1780, and was never retaken. See note, East's C. L. ch. 5. s. 89.

CASE CV.

THE KING *against* PEAR.

Obtaining a horse under *the pretence of hiring it* for a day, and immediately selling it, is felony, if the Jury find the hiring was *animo furandi*. S. C. 2 East, 685, 697.

THIS case was reserved by MR. JUSTICE ASHHURST, at the Old Bailey in September Session 1779.

THE prisoner was indicted for stealing a black horse, the property of *Samuel Finch*. It appeared in evidence that *Samuel Finch* was a Livery-Stable-keeper in the Borough; and that the prisoner, on the 2d of July 1779, hired the horse of him to go to *Sutton*, in the county of *Surry*, and back again, saying on being asked where he lived, that he lodged at No. 25 in King-street, and should return about eight o'clock the same evening. He did not return; and it was proved that he had sold the horse on the very day he had hired it, to one *William Hollist*, in Smithfield Market; and that he had no lodging at the place to which he had given the prosecutor directions.

THE learned JUDGE said: There had been different opinions on the law of this class of cases; that the general doctrine then was that if a horse be let for a particular portion of time, and after that time is expired, the party hiring, instead of returning the horse to its owner, sell it and convert the money to his own use, it is felony, because there is then no *privity of contract* subsisting between the parties;

1779.

PEAR'S CASE.

that in the present case the horse was hired to take a journey into *Surry*, and the prisoner sold him the same day, without taking any such journey; that there were also other circumstances which imported that at the time of the hiring the prisoner had it in intention to sell the horse, as his saying that he lodged at a place where in fact he was not known. He therefore left it with the Jury to consider, Whether the prisoner meant *at the time of the hiring* to take such journey, but was *afterwards* tempted to sell the horse? for if so he must be acquitted; but that if they were of opinion that at the time of the hiring the journey was a mere pretence to get the horse into his possession, and he had no intention to take such journey but intended to sell the horse, they would find that fact *specially* for the opinion of the JUDGES.

THE Jury found that the facts above stated were true; and also that the prisoner had hired the horse with a fraudulent view and intention of selling it immediately.

THE question was referred to the JUDGES, Whether the delivery of the horse by the prosecutor to the prisoner, had so far changed the possession of the property, as to render the subsequent conversion of it a mere breach of trust, or whether the conversion was felonious?

THE JUDGES differed greatly in opinion on this case; and delivered their opinions *seriatim* upon it at LORD CHIEF JUSTICE DE GRAY'S house on 4th February 1780 and on the 22nd of the same month MR. BARON PERRYN delivered their opinion on it (*a*). The majority of them thought, That the question, as to the original intention of the prisoner in hiring the horse, had been properly left to the jury; and as they had found, that his view in so doing was fraudulent, the parting with the *property* had not changed the nature of the *possession*, but that it remained unaltered in the pro-

See the case of Sharpless and another, *ante*, page 92, case 52.

(*a*) This Judgment it seems was settled, and approved by several of the Judges before it was delivered, and it is stated at large by Mr. East, 2 vol. 686. 689.

1779. secutor at the time of the conversion; and that the prisoner was therefore guilty of felony (*a*).

PEAR'S CASE.

(*a*) At the Old Bailey in October Session, 1729, *John Tunnard* was tried before Lord Chief Justice RAYMOND, present Mr. Baron HALE and Mr. Justice DENTON, for stealing a brown mare, the property of *Henry Smith*. It appeared in evidence, that the prosecutor lived in the Isle of Ely; that he *lent* the prisoner the mare to ride to a place three miles distant; but that instead of riding the three miles according to the agreement, the prisoner rode her up to *London*, and sold her. Lord Chief Justice RAYMOND left it with the Jury *quo animo* he had ridden the mare to *London*, and they found him guilty.—THE COURT. The finding of the Jury will make this case felony, because he rode the mare farther than he had agreed to do; for if there had been no special agreement the *privity* would have remained, and it could not have been felony. *M. S.* And see S. C. stated 2 East, 687. See also *Kelynge*, 24. 81. *Shower*, 50. 57. *Aikles's Case*, *O. B. January Session* 1784. *Charlewood's Case*, *O. B. February Session* 1786. and *Major Semple's Case*, *July Session* 1786, accordant.

CASE CVI.

THE KING *against* JOHN TAYLOR.

The *drawee* of a bill is not competent to prove that a *receipt* indorsed for the value of it is forged, without he has a release from the *indorsee*.

S. C. 2 East, 960

S. P. Rex *v.* Akehurst, *ante* p. 150, case 81.

AT the Old Bailey in October Session 1779, *John Taylor* was tried before MR. JUSTICE WILLES, present MR. BARON EYRE, for that he having in his possession a bill of exchange in the words and figures following:

"SIR, TAMWORTH, 2*d August*, 1779.

"ONE MONTH after date please to pay to my order the "sum of Twenty Pounds, value received as *per* advice from "THOMAS HARPER."

"To Mr. JOSEPH CUFF,
"*No.* 125, *Whitechapel*,
"LONDON."

feloniously did make, forge, and counterfeit a receipt and acquittance for the said sum of Twenty Pounds, as followeth, "*Recd. W. Wilson*," with intention to defraud the said *Joseph Cuff*.

THERE was a second count for uttering with the like intention; and a third and fourth count for forging and utter-

ing it with intention to defraud *John Briggs* and *Henry Sutton.* 1779.

TAYLOR'S CASE.

UPON the bill being produced, it appeared that "*Thomas* "*Harper*," the drawer and payee, had indorsed it over by *a special* indorsement, to "*Bird* and *Jones*, or order," who had indorsed it *in blank*, and paid it away to Mr. *Sutton*, a London tradesman then at Birmingham, who inclosed it with five other bills, in the presence of the prisoner, in a letter directed to Messrs. *Briggs* and *Sutton*, on Garlick-hill; and which letter was put into the post-house at Birmingham; but it never arrived as directed in London. Mr. *Briggs*, on receiving advice of these bills having been sent, applied to Mr. *Cuff* to stop payment of the bill in question; but it appeared that Mr. *Cuff* had paid the bill to the prisoner though it then wanted three days of being due, on his allowing him one shilling for the discount on it, for the three days it had to run.

To prove that it was the prisoner who had received the 20*l.* and witnessed the receipt in the name of "*W. Wilson*," DAVY, *Serjeant*, for the prosecution called Mr. *Cuff*; but the Court concurred with MORGAN, the prisoner's Counsel, that he was not a competent witness; for he had, by paying the bill before it became due, opened a question, whether he was not liable to repay the money. On receiving a release however from *Sutton* and *Briggs*, the indorsers of the bill, his evidence was received (1), by which it appeared that when he paid the money to the prisoner he desired him to write a receipt on the back of the bill, which he did, by writing thereon the fictitious name *W. Wilson.*

(1) It was doubted whether Mr. Cuff ought not to have released the drawer.

THE EVIDENCE for the prosecution being closed, the prisoner's Counsel submitted to the Court, that this receipt was not a receipt for money, within the meaning of the statute; for that it was essential to the commission of forgery that the act should be done in the name of another (2); but that in the present case, for any thing that had appeared to the

A receipt indorsed on a bill of exchange in a fictitious name, is a forgery, although it do not purport to be the name of any particular person.

(2) See 3 Institute 169.

1779.

TAYLOR'S CASE.

contrary, there never was such a person existing as the "*William Wilson*" whose name was supposed to have been forged. It was also submitted that the name *William Wilson*, could not have been used with an *intention to defraud*, because no receipt at all was necessary, and the prisoner might as well have procured payment of the bill by writing the receipt in the name of "*John Taylor*," as in the name of "*William Wilson*;" for the possession of the bill was a sufficient discharge to the drawee, which discharge was not any way strengthened by the receipt the prisoner had given, and therefore the use of the fictitious name not being necessary to the accomplishment of any fraud, was of no effect; that he was not compellable to give any receipt; that he gained no additional credit by the name he assumed; and that what he had written was a mere memorandum, and did not operate as an acquittance against any person but the man himself who received the money, and who would be equally estopped by it, as if he had written his own name.

THE Court however over-ruled both the objections, being of opinion that as this was *a false receipt* the case was clearly within the statute; that the prisoner knew he had obtained the bill fraudulently; that the better to elude enquiry after him, it was necessary to conceal his name; that his object was to defraud the real owner of the bill of its value; and that if he intended to defraud any body by the fictitious signature, it was sufficient to constitute forgery.

THE Jury found the prisoner *Guilty*; but the judgment was respited, and the case referred to the consideration of the TWELVE JUDGES, eleven of whom were of opinion, that though the prisoner did not gain any additional credit by signing the name *W. Wilson* to the receipt, as the bill was not by the indorsement made payable to the person whose name was used, yet still it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent the person receiving the money, from being so readily traced (*a*).

(*a*) See the case of Edward Taft, *ante*, page 172. Case 88. and the case of Tatlock *v.* Harris, 3 Term Rep. 176, where it is said in *argument*, at the Bar,

and seemingly adopted by the Court, that it is no answer to the charge of FORGERY to say, that there was no *special intent* to defraud any *particular person*, because *a general intent* to defraud is sufficient to constitute the crime; for if a person do an act, the *probable* consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent.

1779.

TAYLOR'S CASE.

1780.

THE KING *against* ANNE GOULD.

CASE CVII.

If a wife steal the property of a third person in the house of her husband, it is not stealing in *the house of another* within the 12 Ann. c. 7. S. C. 2 East, 644.

AT the Old Bailey in January Session 1780, *Anne*, the wife of *John Gould*, was tried before NARES, JUSTICE, present SKINNER, CHIEF BARON, ASHHURST, JUSTICE, and ADAIR, RECORDER, on an indictment charging the prisoner with having stolen "one leathern purse containing six guineas, &c." the property of *William Herring*, in the dwelling-house of the said *John Gould*.

THIS indictment was framed on the statute of 12 Ann. c. 7. which enacts, "That every person that shall feloniously "steal any money, goods, &c. of the value of forty shillings, "being in any dwelling-house or out-house thereunto be-"longing, although such house or out-house be not actually "broken by such offender, and although the owner of such "goods, or any other person, be or be not in such house, "&c. shall be absolutely debarred of clergy."

See M'Daniel's case, *post*, September Session 1784.

THE JUDGES present were clearly of opinion, in which MR. JUSTICE GOULD afterwards concurred, that the prisoner could not be convicted of the capital part of the indictment inasmuch as the felony was committed in the dwelling-house of her husband, which must be construed to be her house also, and it is apparent that the legislature intended that the stealing must be in the house of another person, to oust the offender of clergy.

1780.

CASE CVIII.

THE KING *against* SPALDING.

A tenant in *possession* of a copyhold messuage is not guilty of ARSON by burning it, although it has been surrendered to the use of a mortgagee; for it is not the house of another while the tenant continues in possession.

S. C. 2 East, 1025.

AT the Lent Assizes holden at *Bury* for the County of *Suffolk*, in the year 1780, *William Spalding* was tried for ARSON, in having set fire to his *own house* at *Hartest*.

THE indictment contained two general counts; the first describing the offence as at common law; for feloniously, wilfully, and maliciously setting fire to and burning his own house at *Hartest*, against the peace, &c.; the second for feloniously, voluntarily, and maliciously setting fire to his own house against the statute of 9 Geo. I. c. 22.

THE premises were copyhold, of which the prisoner was tenant in possession; and on the day laid in the indictment, he wilfully set fire to a girder in the back part of the house, by the means of which a great part of the timber of *the roof* and the entire *thatch* of the house were consumed. The house was situated in the village of *Hartest*, in the County of *Suffolk*, detached from any other house; but there were other houses on each side of it, within the distance of four yards. In the month of January 1776, the prisoner had surrendered the house into the hands of the lord of the manor, to the use of one *Benjamin Nott*, his heirs and assigns, for securing the payment of sixty pounds, with legal interest, on the third of July next following the date of the surrender; but *Benjamin Nott* had never been admitted upon the surrender. The prisoner had insured the house and goods from fire to a considerable amount, and had paid the premium to the Lady-Day subsequent to the commission of the fact. The premises were all insured by *Benjamin Nott*, the mortgagee.

THE Jury found the prisoner *guilty*; but the judgment was respited, and the following points submitted to the consideration of the TWELVE JUDGES.

First, WHETHER the indictment was properly adapted to the case?

1780.

SPALDING'S CASE.

Secondly, WHETHER any evidence as to the mortgage and surrender of the premises ought to have been received?

Thirdly, WHETHER under all the circumstances of the case, the offence amounts to *Arson* at the common law, or to a felonious burning within the meaning of the statute?

ON the first day of Easter Term 1780, this case was propounded to Ten of the JUDGES at LORD MANSFIELD'S Chambers; and upon the first question they were unanimous, That as the indictment was for burning his *own house*, it was insufficient; for that the crime of *Arson* at common law consists in maliciously and voluntarily burning the house of *another*, according to the case of *Rex* v. *Holmes*; and that the statute of 9 Geo. I. c. 22. does not alter the nature of the crime, or create any new offence, but only excludes the principal more clearly from the benefit of clergy than he was excluded before; it being doubtful before that statute, whether or not the principal or at least persons in holy orders were intitled to the benefit of clergy in *Arson* (*a*): that the

L. C. J. *De Grey* absent.

1 Hale, 556. Staund. 36. 3 Inst. 66. 4 El. Com. 220. Foster, 330 to 336.

(*a*) The statute *de Clero*, 25 Edw. III. st. 3. c. 4. provides, that persons convicted of treasons or felonies touching other persons than the king himself, shall be allowed the benefit of clergy; but it was held, that *combustio domorum*, the burning of houses, or ARSON, still remained without this benefit. The Legislature, however, by the 23 Hen. VIII. c. 1. s. 3. thought proper *expressly* to deprive principals and accessaries before the fact, in Arson, of the benefit of clergy, when convicted by *verdict* or *confession*; and the 25 Hen. VIII. c. 3. s. 2. also ousteth such offenders *standing mute*, or refusing to plead, in like manner as if they had pleaded not guilty, and been found guilty. The 1 Edw. VI. c. 12. s. 10. again takes away clergy from many of the offences enumerated in the former Acts; but *is totally silent as to the offence of* ARSON; and then enacts, that in all *other cases of felony*, all persons shall have the benefit of clergy, as they might have had before these Acts were made. The wilful burning of houses, therefore, was by this clause restored to the benefit of clergy. The 5 and 6 Edw. VI. c. 10. revived part of the statutes of 23 Hen. VIII. c. 1. and 25 Hen. VIII. c. 3. but not that part which ousted ARSON of clergy. The 4 and 5 Phil. & Mar. c. 4. however takes away clergy in all cases from him that maliciously *commands*, *hires*, or *counsels* WILFUL BURNING; and it became a question in *Poulter's Case*, 11 Co. 29, Whether, by virtue of these statutes, *a principal* in ARSON was deprived of his clergy? *Poulter* was convicted and hanged. But LORD HALE,

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SPALDING'S CASE.

(1) Cro. Car. 338.

resolution in *Holmes's Case* (1) has been too long established to be controverted, and the interpretation of the statute must be governed by that determination. The circumstance of the premises being insured makes no difference in this case (*a*).

LORD COKE, and others have differed in their opinions respecting the grounds of this decision; LORD HALE, with whom MR. JUSTICE FOSTER coincides, being of opinion that clergy is taken from *the principal* by virtue of the 4 and 5 Phil. & Mar. and LORD COKE, that it is taken away by the revival of 23 Hen. VIII. c. 1. s. 3. and 25 Hen. VIII. c. 3. s. 2. and this is conceived to be the difficulty which occasioned the clause in the statute of 9 Geo. I. c. 22.

(*a*) But by 43 Geo. III. c. 58. it is a capital offence, maliciously to set fire to any house, barn, granary, hop-oast, malt-house, stable, coach-house, out-house, mill, warehouse, or shop, whether they shall then be in the possession of the person or persons so setting fire to the same, or in the possession of any other person or persons or body corporate, with intent thereby to injure or defraud his Majesty or any of his subjects, or any body corporate, or to counsel, aid, or abet therein.

CASE CIX.

THE KING *against* BREEME.

A tenant in possession under agreement for a lease for three years from a lessee who held under a building lease, is not guilty of ARSON by setting the house on fire; and the 9 Geo. I. c. 22. does not vary the nature of this offence.—But see 43 Geo. III. c. 58. *supra*.

S. C. 2 East, 1026.

AT the Old Bailey in April Session 1780, *Andrew Breeme* was indicted before MR. BARON EYRE, for that he, about the hour of twelve in the night, a certain house feloniously, wilfully, and maliciously did set on fire and burn.

THE indictment consisted of six counts, charging the offence to have been committed, *first*, against the common law; and, *secondly*, against the statute 9 Geo. I. c. 22. and laying it to be the house, FIRST, of *William Bolton*; SECONDLY, of *Stone Tuppen*; THIRDLY, of *Andrew Breeme*.

THE Jury found the prisoner *Guilty*; and also that the prisoner wilfully and maliciously set on fire and burned the house mentioned in the indictment: That he was tenant in possession of the house, under a written agreement for a

lease for three years from *Stone Tuppen*: That *Stone Tuppen* had built the house under a lease from *William Bolton* for ninety-nine years; and, That *William Bolton* was tenant in fee-simple of the land on which the house was built.

BUT the judgment was respited, and the question, Whether the conviction was legal? referred to the TWELVE JUDGES upon the above facts.

Bro. Cor. 135, 155. Staund. 36. 2 Inst. 188. Dalt. c. 105. 3 Inst. 66. 1 Hale, 556. 4 Co. 20. 4 Bl. Com. 221, 310, 366. 1 Hawk. 166.

ON the first day of Trinity Term nine of the JUDGES (1) assembled at LORD CHIEF BARON SKYNNER'S Chambers; and they were unanimously of opinion, That the prisoner, under the circumstances of the present case, was not guilty of *Arson*. They said, as in *Spalding's Case*, that *Arson* is the burning the house of *another*; that it is an offence immediately against *the possession*, and that therefore if a person in possession of a house as tenant, however short his term may be, set fire to it, it is not *Arson*. The law upon this subject, they said, had been too long and too firmly established, by *Holmes's Case*, to be now departed from. Some of the JUDGES, however, seemed to doubt the propriety of that determination, and said, that if the question had been unsettled they should have been of a different opinion; but the majority of the JUDGES held, that the determination of *Holmes's Case* was right, for that the principle of it was the protection of the person in the actual and immediate possession of the house. As to the statute 9 Geo. I. c. 22. they held, that it did not vary the nature of the offence as it stood at common law, that Act being merely intended to clear the doubt which had arisen from the reasoning in *Poulter's Case* (2), as to the exclusion of the principal offender from the benefit of clergy; and in this view, they said, it is considered in MR. JUSTICE BLACKSTONE'S Commentaries.

(1) Skynner, C. B. Gould, J. Willes, J. Ashhurst, J. Nares, J. Buller, J. Eyre, B. Hotham, B. Perryn, B.

6 Bac. Abr. 652.

(2) 11 Co. 29. 4 Bl. Com. 220; and see the note to the preceding Case.

1780.

CASE CX. THE KING *against* KEMP.

On the 6 Geo. III. c. 36. for stealing *plants*, it must be proved that the offence was committed in the *night*.

AT the Old Bailey in June Session 1780, *John William Kemp* was tried before MR. JUSTICE ASHHURST on the statute 6 Geo. III. c. 36. for stealing, about the hour of nine in the night on the 10th day of May 1780, sixty plants, called carnation plants, of the value of 3*l*. the property of *John Archer Robertson*; the said plants being then standing and growing in the garden-ground of the said *John Archer Robertson*.

See Howe's Case, *post*, Jan. Sess. 1788, and East's P. C. 588, 1061.

THE prosecutor had a private garden-ground belonging to his house at the back of the Westminster Infirmary, and it having been frequently robbed of its produce about the latter end of April, he on the evening of the 10th May secreted a watchman in the summer-house in order to detect the offender. About half after nine o'clock, while there was yet sufficient twilight remaining to enable him to discover the features of the face, he observed the prisoner get over the fence, and take the carnation plants out of the ground; but after he had bundled them up, and while he was attempting to return with them out of the garden, he pursued and apprehended him.

THE COURT.—To constitute the offence created by this Act of Parliament, it is essential to prove that the property was taken in the night time; and the same rule relative to day and night must be observed in this case, as prevails in cases of burglary: now by the evidence of the watchman, there was yet sufficient day-light remaining to enable him to distinguish the features of the prisoner.

THE Jury accordingly by the direction of the Court found the prisoner *Not Guilty*.

1780.

THE KING *against* PATRICK MADAN. CASE CXI.

A prisoner convicted of a capital crime whose sentence is respited during the King's pleasure, and who, on having received a pardon on condition of transportation for life, is afterwards found at large in Great Britain without lawful cause, shall be referred back to his original sentence.

AT the Old Bailey in December Session 1780, *Patrick Madan* was capitally convicted on the statute 10 and 11 Will. III. c. 23. for privately stealing a collection of jewels in the shop of *William Storey*, and judgment of death was passed upon him at the conclusion of the Session. The execution of his sentence was afterwards respited during his Majesty's pleasure; and he accepted a pardon *on condition* of being transported to the coast of Africa for and during the term of his natural life. In consequence of this pardon, he was delivered from *Newgate* under an order of the Court, and, with other convicts, put on board a ship commanded by *Captain Mackenzie*. They set sail for *Africa;* but the ship was driven by contrary winds into the *Cove of Cork* in *Ireland;* from which place he made his escape, and returned to *London*, where he was apprehended, and committed to *Newgate*, for being found at large contrary to the condition of his Majesty's pardon.

No indictment was ever preferred against him for the new felony; but on the 7th December 1781, THE COURT ordered notice in writing to be given to him, to shew cause the next day why execution should not be awarded against him on his former sentence.

THE following day, on being put to the bar, and his identity and the record of his former conviction being proved, he stated to the Court, that while the ship remained in the *Cove of Cork*, he, with many others of the crew, were sent on shore by order of Sir *John Irwin*, Commander in Chief, and put into sick quarters; and that before his recovery the Captain received orders from the Admiralty to sail, which he obeyed, leaving him sick, and unable to be removed, on shore. But not being prepared with witnesses to prove these facts, he was remanded till the next Session.

IN January Session 1782 he was again put to the bar, and

See the case of Maximilian Miller, *ante*, Jan. Sess. 1771, page 74, Case 41, and Aickles's Case, Old Bailey Sept. Sess. 1785, *post*.

1780. not being prepared with any evidence to prove the truth of the facts above stated, THE COURT were of opinion, That having broken the condition of the pardon, he remained in the same state in which he was at the time that pardon was granted, *viz.* under sentence of death, with a respite of that sentence during his Majesty's pleasure; and he was accordingly remanded under his former sentence.

MADAN'S CASE.

IT was afterwards submitted to the consideration of the TWELVE JUDGES, Whether, under all the circumstances of this case, the prisoner was liable to suffer death, without benefit of clergy, if he had been indicted and convicted under the statute of 8 Geo. III. c. 15.? or, Whether he had been properly referred to his original sentence in December Session 1780, with the respite during his Majesty's pleasure.

IN April Session 1782 he was informed by THE COURT, that it was his Majesty's pleasure, that he should be transported to the Coast of *Africa* during the term of his natural life.

1781.

CASE CXII.

THE KING *against* EMPSON.

To constitute the offence of maliciously shooting at another under 9 Geo. I. c. 22. the shooting must be with a gun or other instrument, levelled *at* the party. 1 East, C. L. 412.

AT the Old Bailey in April Session 1781, *Fielding Empson* was tried before THE RECORDER on the statute 9 Geo. I. c. 22. for maliciously shooting at *Richard Cook*. The indictment consisted of two counts; the first alleging that the gun was loaded with *gunpowder and a leaden slug;* and the second omitting that allegation.

THE prosecutor, Mr. *Richard Cook*, was the landlord of a small tenement situated near *Willans farm*, in *Marybone fields;* which tenement had been let to the prisoner, without the knowledge or consent of *Cook*, by the preceding tenant. At Christmas 1780, a considerable arrear of rent was due from the prisoner, who instead of even promising payment, had frequently set *Cook* at defiance, and told him that he

1781.

EMPSON'S CASE.

might get it how he could. The prosecutor, irritated by this misconduct, distrained for the rent, and on the 16th January 1781 put a man of the name of *Green* into possession of the prisoner's goods. To prevent *Green* from leaving the premises it was necessary to furnish him with victuals, and the prisoner having refused admittance either to the prosecutor or to any other person for this purpose, Mr. *Cook* had for two evenings got over the pales belonging to the garden of the house, and by this means conveyed to *Green* his meals for the succeeding day. On the evening of the 18th January, *Cook* went as usual with provisions, and requested admittance at the door of the house; but being refused, he repaired to his usual place at the pales, and got over into the garden, but instead of meeting with *Green* to receive his basket of food, he found the prisoner with a drawn sword in his hand, with the blade of which he beat and bruised him unmercifully in every part of his body, until the prisoner was prevented from proceeding further in this outrage by a person who lodged in the house, and by whose assistance the prisoner had shortly before paid *Green* the arrears of rent and charges of distress, and sent him away. The prosecutor being thus released, took up his basket in order to make the best of his way out of the garden, but conceiving that if he made his escape over the same part of the pales at which he had entered the prisoner might follow him, he went to *another part of the garden, more than five yards distant from the part at which he had entered;* but he had scarce climbed to the top of the pales, before the prisoner again made his appearance at the back door of the house with a gun in his hand, which he levelled at *the place at which the prosecutor had got in*, and immediately fired it off; but there was no evidence that it was loaded with either shot or bullet; for—

THE COURT conceived that all further enquiry into the subject was unnecessary, as it appeared most clearly that the gun was not pointed towards the place where the prosecutor then was; for that to constitute the offence created by this branch of the Black Act, there must be a shooting *at*

1781. the person (1), of which fact there was not sufficient evidence in the present case; and

EMPSON'S CASE.

THE JURY accordingly found the prisoner *Not Guilty.*

(1) See now 43 Geo. III. c. 58. that if any person shall maliciously shoot *at*, or present, point, or level any kind of loaded fire-arms at another, and attempt by drawing a trigger or in any other manner to discharge the same, *at or against* any other person with intent to murder, rob, maim, disfigure or disable; or to do some other grievous bodily harm, &c. &c. he shall be guilty of felony without clergy.

CASE CXIII. THE KING *against* JOHN SHEPPARD.

Uttering a forged order for the payment of money under *a false representation*, is evidence of knowing it to be forged. S. C. 2 East, 967.

AT the Old Bailey in September Session 1781, *John Sheppard* was tried before MR. JUSTICE ASHHURST, for uttering the following *order for payment of money*, knowing it to be forged, with intention to defraud *James Elliot:*

GREEN-STREET, 31*st July* 1781.

"SIRS, Pray Pay to Mr. *John Atkins*, or bearer, six pounds "six shillings, value received. Yours, &c.

"H. TURNER." (*a*)

"To MESSRS. BROWN, COLLINSON, & Co. Lombard Street.

THE following facts appeared in evidence:

THE PROSECUTOR was a silversmith; and the prisoner having looked out several goods at his shop to the amount of six guineas, pulled out his purse, as if going to pay for them, saying, "I believe I have not cash enough about me, but "here is a draft on a banker, which is the same thing as "money; for it will be paid when presented." He accordingly laid the draft on the counter, and desired to see some

(*a*) It seems that one of the objections made in this case was that it ought to have been laid to be *a Bill of Exchange*, according to the case of *Grant* v. *Vaughan;* but in Michaelmas Term 1781, the Judges were unanimously of opinion that it was properly laid: and it was observed that the indictment and draft were the same as in *Lockett's Case*, *ante*, 94, where all the Judges held the conviction proper, and that every *Bill of Exchange* seemed to be an *order for payment of money*, though not *vice versa*, 2 East, 944. See also Willoughby's case to the same effect, 2 East Rep. 581. and 2 East, C. L. 944.

1781.

SHEPPARD'S CASE.

silver spurs; but the prosecutor not having any of the kind which he described, the prisoner said, "Then you must "send me a pair." Mr. *Elliot* looked at the draft as it lay on the counter, and then taking his order-book, and imagining the draft to be the prisoner's draft, and the prisoner's name to be the same as that in which the draft was signed, he wrote, "*H. Turner, Esq.*" The prisoner looked over him, and desired him to add, "*Junior, Noah's Row, Hamp-*"*ton Court,*" and then went away. It appeared that no person of the name of *H. Turner* kept cash at *Brown and Collinson*'s, or lived in *Green-street;* nor could such a place as *Noah's Row*, or such a person as *H. Turner, jun.* be found at *Hampton Court.* But Mr. *Elliot* the prosecutor said, that as the sum was small, and the prisoner's appearance genteel, and believing the draft which was on a house he knew, to be the prisoner's draft, he gave credit to the *prisoner* and not to *the draft.*

THE Jury found the prisoner *Guilty;* and he received judgment of death: but the execution of the sentence was respited, on a doubt whether as *Elliot* had sworn that he gave credit to *the prisoner*, and not to *the draft*, it could amount to the crime of forgery.

IN January Session 1782 the prisoner was put to the bar, and informed by MR. RECORDER, That the TWELVE JUDGES were unanimously of opinion, that the conviction was legal, for it was a false instrument, not drawn by any such person as it purported to be, and the using a fictitious name was only for the purpose of deceiving.

R. *v.* Locket, *ante*, page 94, case 58.
R. *v.* Dunn, *ante*, page 57, case 32.

THE Prisoner however received a conditional pardon, in consideration of the long confinement he had suffered; and he was sentenced under the statute 19 Geo. III. c. 74. s. 28. to raise gravel for three years on the river Thames.

1781.

THE KING *against* PEAT.

CASE CXIV.

If a robber take a purse of money from a person, and restore it to him immediately, saying, "*If you value your purse take it back and give me the contents,*" but is apprehended before the money is delivered to him, yet the crime is completed.

S. C. 2 East, 557.
1 Hale 533, 70.
3 Inst. 60, 69.
1 Hawk. 147.

OLD-BAILEY December Session 1781, the prisoner was indicted before MR. BARON HOTHAM, present MR. JUSTICE WILLES, for a highway robbery on *Richard Downe*, Esq. by putting him in corporal fear and danger of his life, and taking from his person a silk purse, value three-pence, and twenty-three shillings in monies numbered.

THE prisoner on horseback stopped Mr. *Downe*'s carriage on *Finchley Common*, and demanded his money. Mr. *Downe* gave him his purse. The prisoner took it, but immediately returned it again to Mr. *Downe*, saying, "If you value your "purse you will please to take it back, and give me the con-"tents of it." Mr. *Downe* received it back, but while he was taking out the money, and before he had re-delivered the purse to the prisoner, Mr. *Downe*'s servant jumped from behind the carriage and secured the prisoner.

A DOUBT arose, Whether, as robbery is only an aggravated species of *larceny*, there was a sufficient *asportation* in this case to constitute the offence?

BUT THE COURT held, that although the prosecutor did not eventually lose either his purse or his money, yet as the prisoner had in fact demanded his money, and under the impulse of that threat and demand the property had been once taken from the prosecutor by the prisoner, it was in strictness of law a sufficient *taking* to complete the offence, although the prisoner's possession had continued for an instant only (*a*).

(*a*) *A.* requires *B.* to deliver his purse, and he delivers it accordingly; but *A.* finding only two shillings in it, gives him it again, yet this is *a taking* by robbery. Cromp. 34. Dalt. c. 153. p. 492. 1 Hale, 533. For he who has once actually completed the offence, by taking the goods of another, *in such a manner* into his *possession*, cannot afterwards purge it by any re-delivery. Sum. 70. 3 Inst. 60. 1 Hawk. P. C. 147. The outrage offered to the rights of society does not vary in its nature, because it is ineffectual in its consequences, Eden's P. P. L. 286; and the continuance of the property in the possession of the robber, is not required by law. 3 Inst. 69. See also Staund. 27.

1781.

PEAT'S CASE.

THE Jury accordingly found the prisoner *Guilty* of the highway robbery; but he afterwards received a pardon on condition of being transported to Nova Scotia for seven years, which condition he accepted in the month of July 1783, and was transported accordingly; but in July Session 1784, he was tried for being found at large without any lawful excuse before his time had expired; but as no person could prove that he was the identical man who had been convicted of robbing Mr. *Downe*, he was found *Not Guilty*.

1782.

CASE CXV.

THE KING *against* JOHN HEVEY.

To utter a bill of exchange under a *false assertion* of being the person to whom it was made payable, and by whom it had been indorsed, is a *misdemeanor*.

S. C. 2 East, 556, 856.

See Sheppard's Case, *ante*, p. 226, case 113. Dougl. 300.

AT the Old Bailey in January Session 1782, *John Hevey* was indicted on the statute 2 Geo. II. c. 25. before MR. JUSTICE ASHHURST, for forging an indorsement on the back of a bill of exchange, in the name of "*B. M'Carty*," with intent to defraud *William Masters* and *Edward Beauchamp*, against the statute.

THERE was a second count, for uttering and publishing a forged indorsement in the name of "*B. M'Carty*," with the like intention, against the statute.

"No. 59. £. 30: 00: 0. BATH BANK, *Nov.* 19, 1781.
"THIRTY-ONE days after sight, pay Mr. *Barnard M'Carty* "or order, Thirty Pounds, Value received, for *Smith, Moore*, "*and Co.*

"JER. CONNELL."

"To Rich. Beatty and Co.
"No. 19, Gt. St. Helen's, London."

(*Acc. R. B. and Co.*)

IT appeared in evidence, that the prisoner, by the name of *John Hevey*, had procured the copper-plate to be engraved from which the skeleton of the bill in question had been printed. In the month of November 1781, the prisoner went to the shop of the prosecutors, who were pawnbrokers in Holborn, bargained for a gold watch at the price of eighteen

1782. guineas, and offered the BATH BANK BILL above described in payment. Mr. *Beauchamp* examined the bill, and shewing the indorsement to the prisoner, asked him if his name was *M'Carty*. The prisoner replied, "*Yes, Sir, it is. You "have no occasion to be afraid, it is better than a note of "the Bank of England; it is a very good bill, and I have "indorsed it.*" Mr. *Beauchamp*, however, refused to take it, until he had sent his servant with it into *Great St. Helen's*, to know whether the acceptance *Richard Beatty and Co.* was genuine. The servant took the bill according to the directions, and received information from a gentleman who answered to the name of *Beatty*, that it was a good bill, and would be regularly paid when due. In consequence of this information, the prosecutor let the prisoner have the watch, gave him 11*l.* 2*s.* in exchange, and a bill of parcels, with a receipt in the name of *M'Carty* for the 18*l.* 18*s.* 0*d.* The bill was not paid, nor were there any such persons as *Smith, Moore, and Co.* to be found at Bath. The prisoner and *Beatty* were apprehended, and committed for the supposed forgery. In the prisoner's custody were found a number of notes, of different dates and sums, indorsed in the name of "*B. M'Carty;*" but it was positively sworn, that these indorsements, as well as that on the back of the bill in question, were in the hand-writing of one *Barnard M'Carty*, who lived in *St. Giles's*, and had absconded. It was also proved that the prisoner's real name was *John Hevey.*

HEVEY'S CASE.

THE learned Judge told the Jury that if they were of opinion that there was no such person as *Barnard M'Carty*, or that the indorsement was not his hand-writing, they must find the prisoner guilty; but that if they were satisfied that such a person existed, and that he had written the indorsement, yet if they were of opinion that the prisoner was not that person, but had passed himself off on the prosecutor as such, they should find him Guilty, and the case should be reserved for the opinion of the Judges, whether under all the circumstances it amounted to the crime of forgery. The Jury found "That the indorsement B. M'CARTY was in the

" hand-writing of a person of that name; but that *John* " *Hevey*, the prisoner at the bar, was not the man, but that " he had passed himself upon the prosecutor Mr. *Beauchamp* " as being *B. M'Carty* the indorser," at the time he tendered the bill in payment.

THE question was therefore referred, Whether, if a man produce the real signature of a person existing, purporting to be the indorsement of such person, and falsely declare that he is the identical person whose indorsement it purports to be, it amounts in point of law to the offence of forgery?

ON the first day of Hilary Term 1782, eleven of the JUDGES conferred upon this case; and at the Old Bailey in February Session following, MR. JUSTICE GOULD, after stating the circumstances of the case as above described, delivered the opinion of the Judges to the following effect. The question referred to the opinion of the Judges was, whether this amounted to the crime of forgery, or to the crime of uttering this Bill knowing it to be forged. Upon the first day of Hilary Term eleven Judges assembled to consider this case, and they are of opinion that in point of law, the prisoner is not guilty of the offence charged upon him by this indictment. The statute 2 Geo. II. c. 25. enacts " That if any " person shall *falsely make*, forge or counterfeit, or cause or " procure to be *falsely made*, forged or counterfeited, or wil- " lingly act, or assist in the *false making*, forging or coun- " terfeiting any deed, will, testament, bond, writing obli- " gatory, Bill of Exchange, promissory note for payment of " money, *indorsement* or assignment of any Bill of Exchange " or promissory note for payment of money, &c. with in- " tention to defraud any person whatsoever, or shall utter " or publish as true, any false, forged or counterfeited deed, " &c. with intention to defraud any person, knowing the " same to be *false*, forged or counterfeited, then every such " person, &c. shall be deemed guilty of felony without be- " nefit of clergy." There must therefore be a *false making* of some of the instruments mentioned in the Act, to constitute the crime of forgery; but in the present case the Jury

Lord Mansfield.
Lord Loughborough.
Lord C. B. Skynner, B.
Gould, J.
Willes, J.
Ashhurst, J.
Nares, J.
Buller, J.
Heath, J.
Eyre, B.
Hotham, B.

1782. HEVEY'S CASE.

were satisfied that in fact there was such a man as *Barnard M'Carty*, and that the name *B. M'Carty* upon the bill was of the hand-writing of that *M'Carty*. This therefore is not what the indictment charges it to be, a false instrument.

THE prisoner however was detained, and at the same Session *John Hevey* and *Richard Beatty* were indicted, with *Barnard M'Carty*, for the conspiracy to defraud, and were convicted.

CASE CXVI.

THE KING *against* HEVEY, BEATTY AND M'CARTY.

If a bill purporting to be accepted by J.H. be shewn to him, and he declares it to be a *good bill*, that is sufficient proof that he wrote the acceptance.

AT the Old Bailey in February Session 1782, *John Hevey*, *Richard Beatty*, and *Barnard M'Carty* were indicted before JAMES ADAIR, ESQ. Serjeant at Law and Recorder of the City of *London*, for that they on the 26th of November, 1781, did fraudulently and unlawfully confederate, *conspire*, and agree that *Richard Beatty* should write his acceptance to a certain paper-writing, purporting to be a bill of exchange, the tenor of which is as follows; that is to say,

"No. 64.—£20. BATH BANK, *Nov.* 19, 1781.

"THIRTY-ONE days after sight pay *Mr. Barnard M'Carty*, "or order, Twenty Pounds, value received,

"*For Smith, Moore, and Co.*

"JER. CONNELL."

"To Richard Beatty, and Co.

"No. 19, Great St. Helen's, London."

IN order that *John Hevey* might by such acceptance, and by the name of *B. M'Carty* being indorsed thereon, negotiate the said paper-writing as a good bill of exchange, truly drawn at Bath by one *Jer. Connell* for *Smith, Moore and Co.* as partners in the business of Bankers under the style of *Bath Bank*, as persons well known to them the said, &c. and thereby fraudulently to obtain from the King's subjects, goods and monies: that *Richard Beatty*, in pursuance of such conspiracy and agreement, did fraudulently and unlawfully write his acceptance to the said paper-writing, to the tenor following, "accepted, 20 Nov. 81, R. B." well knowing the firm

of *Smith, Moore and Co.* to be fictitious: that the said *Barnard M'Carty*, well knowing the same to be fictitious, wrote the name *Barnard M'Carty* upon the back of the said bill of exchange; and that the said *John Hevey*, in pursuance of such fraudulent conspiracy, did utter and publish the said paper-writing, so purporting to be a bill of exchange, to *Samuel Read* the younger, as and for a good bill of exchange truly drawn, &c. and accepted by the said *Richard Beatty*, as a person able to pay the said twenty pounds, in order to negotiate the same to *Samuel Read* the elder, and by means thereof he did fraudulently obtain and got into his possession, one gold watch of the value of 12*l.* 12*s.* and seven pounds, and eight shillings in money, whereas in truth at the time of drawing, accepting and uttering the said bill, there were no such persons as *Smith, Moore and Co.* in the business of bankers at Bath, and the said *Richard Beatty* was not of sufficient ability to pay the said twenty pounds, they the said *John Hevey, Richard Beatty*, and *Barnard M'Carty* well knowing the same, &c. whereby the said *John Hevey, Richard Beatty*, and *Barnard M'Carty*, he the said *Samuel Read* the elder, of his goods and monies did deceive, cheat, and defraud, against the peace of our Lord the King, his Crown and Dignity.

In the month of June 1781, the prisoners *Richard Beatty* and *Barnard M'Carty* executed articles of copartnership between each other, which were witnessed by the other prisoner *John Hevey*, and on the ensuing day *John Hevey* and *Barnard M'Carty* executed other articles of copartnership between each other, which were witnessed by *Richard Beatty*. By these articles, which were dated 24 September 1781, it was agreed that they should become partners in business, but without specifying of what kind it should be; that they proposed to begin at No. 19, Great St. Helen's in Bishopsgate Street; and that upon any disagreement each should be at liberty immediately to dissolve the connection. In consequence of these agreements, one counting-house was taken at No. 19, Great St. Helen's, on the door of which was placed a brass-plate with the words "*Beatty and Co.*" inscribed

1782.

HEVEY, BEATTY AND M'CARTY'S CASE.

thereon, and another counting-house in Westgate Street, Bath, under the firm of *Smith, Moore and Co.* at which *M'Carty* and *Hevey* occasionally attended. In the middle of July 1781, *Hevey* procured a plate to be engraved from which the printed part of the bill stated in the indictment had been impressed, and it was proved that five hundred of the same impression had been struck off from the plate, and that by these means they had procured credit from several persons for rum, brandy, watches, and other articles of merchandise to a very considerable amount. On Tuesday, 27 November 1781, *John Hevey* went to the house of Mr. *Samuel Read*, a watch-maker in Fetter Lane, and desired to see some gold watches, which he pretended to want for exportation. Mr. *Read*'s son shewed him several, out of which he chose one of the value of twelve guineas, and produced the bill, stated in the indictment, to pay for it. During this time Mr. *Read* himself came in, and on looking at the bill, hesitated to take it. Upon which *Hevey* said, " It is a good bill; if you have " the least doubt about it, you may send to the acceptor and " be satisfied." Mr. *Read*'s son accordingly went with *Hevey* to the counting-house at No. 19, Great St. Helen's, where he saw the prisoner *Richard Beatty* surrounded with books and papers and acting like a clerk in the midst of business. The young man shewed *Beatty* the bill, with the acceptance on it, and asked him if it was a good one, and *Beatty* after looking at it for some time, returned it saying, " It is a very " good bill; a very good bill." The young man accordingly gave *Hevey*, who was waiting in the street, the gold watch, which he had carried with him, and 7*l.* 8*s.* the difference, as soon as he came out. Before the bill became due, all the parties to the contract had run away, but they were soon afterwards apprehended, when it appeared that *Beatty* had been a ballast-heaver by business; that *Hevey* was an insolvent debtor, who had been liberated from the King's Bench Prison by the rioters in the year 1780; and that *M'Carty* was a poor man, who had before resided in *St. Giles's*, and had absconded.

1782.

HEVEY, BEATTY AND M'CARTY'S CASE.

Letters which have never been in the custody of a prisoner, cannot be read in evidence against him.

AFTER the prisoners had been apprehended and examined before the sitting alderman, several letters which were directed to "Beatty and Co. No. 19, Great St. Helen's," were intercepted at the Post-Office, and were attempted to be given in evidence against the prisoners at the trial; but the Court said that as they had never been in the custody of the prisoners, or any way adopted by them, they were inadmissible.

THE prisoners' Counsel then objected, that as the indictment distinctly and substantially charged that *Richard Beatty* had *written* his acceptance of this bill, it was necessary that the fact of its being his hand-writing, ought to have been distinctly and substantially proved.

THE COUNSEL for the prosecution contended, that as *Beatty* was the person to whom this bill had been shewn, his having said that it was *a good bill* and would be paid when due, was an acknowledgement that he had accepted the bill.

THE COURT said that there was no doubt but that what *Beatty* had said was in itself a good acceptance of the bill, and that if it had been charged in the indictment to have been so accepted, or if it had charged, "that the bill so uttered "by *Hevey*, the said *Richard Beatty* did fraudulently declare "was a good bill, upon the bill being presented to him, so "purporting to be accepted by the said *Richard Beatty*," it would have been sufficient evidence of that fact, but that in the present case the acceptance was charged to have been by *writing*, and not by *parol*, and, if an indictment states distinct substantial facts, they must be proved, and cannot be treated as surplusage, although perhaps they were not essentially necessary to make out the crime, and the indictment would have been good without them. If therefore the Jury are of opinion, on the merits of this case, that the prisoners are guilty, the Court will reserve this point for the opinion of THE JUDGES, more especially as this is the confession of one of the prisoners only, and a confession can only affect the person out of whose mouth it comes, and that it is as necessary that the fact should be proved against *Hevey* as against *Beatty*.

1782.

HEVEY, BEATTY AND M'CARTY'S CASE.

THE JURY found the two prisoners *Hevey* and *Beatty* Guilty.

AND the question was reserved for the consideration of THE JUDGES, Whether the evidence of *Beatty* having said it was *a good bill*, was sufficient proof of the allegation in the indictment that he had written the acceptance thereon.

AND ALL THE JUDGES on 17 April 1782, were unanimously of opinion, that the confession was properly left to the Jury, as evidence from which they might find the fact of his having written the acceptance, and that the conviction was right.

CASE CXVII.

THE KING *against* HENRY COSLET.

To remove a package from the head to the tail of a waggon, with a felonious intent to take it away, is a sufficient asportation to constitute larceny; but merely to *alter the position* of a package on *the spot* where it lies, is not.

S. C. 2 East, 556. Bro. Cor. 45, 48, 137, 160. Kely, 24. 1 Hale, 504. 1 Hawk. 134.

AT the Old Bailey in February Session 1782, *Henry Coslet* was indicted for stealing a quantity of currants, the property of *John Parker*.

THE prosecutor was the proprietor of the Uxbridge waggon, in the forepart of which the goods laid in the indictment were packed. The prisoner got into the waggon, and after groping about on his hands and knees, laid hold of this parcel of currants, and had got near the tail of the waggon with them when he was apprehended. The parcel was afterwards found near the middle part of the waggon.

THE Jury found the prisoner *Guilty*; but as he had not carried the goods out of the waggon, the Court doubted, Whether this was a sufficient *asportation* to constitute the crime of larceny. The judgment was accordingly respited, and the case reserved for the consideration of the TWELVE JUDGES; and on 17th April 1782, they were unanimously of opinion, That as the prisoner had removed the property from the *spot* where it was originally placed, and the Jury had found that he had so removed it with intent to steal, it was a sufficient *taking and carrying away* to constitute the offence (*a*).

(*a*) MR. BARON PERRYN, before whom the prisoner was tried, mentioned a case of one *Cherry* which had been reserved at the Oxford Lent

Assizes 1781, by MR. JUSTICE NARES for the consideration of the TWELVE JUDGES.—The prisoner was indicted for stealing, taking and carrying away a wrapper and four pieces of linen cloth. This bale contained linen, packed up in the form of a long square; and was put into a waggon travelling the Acton Road; it laid lengthways in the waggon; the prisoner set it up on one end, for the greater conveniency of taking the linen out; and cut the cloth or wrapper all the way down with intent to take out the contents, but he was discovered and apprehended before he had taken any thing out of it. The Jury found the prisoner guilty, but the case was saved for the opinion of the Judges, whether this was a sufficient taking away to support the indictment. And on 2d May 1781, the whole TWELVE JUDGES were of opinion that it was not such a removal of the property as was necessary to constitute the offence of larceny.

1782.

COSLET'S CASE.

THE KING *against* RICHARD CARRELL.

CASE CXVIII.

AT the Old Bailey in February Session 1782, *Richard Carrell*, a young lad stone-blind, was convicted before ADAIR, Recorder, of breaking and entering the dwelling-house of *John Jordan*, in the night-time, with intent to steal.

A garret made use of as a workshop, and rented with a sleeping-room by the week, is the mansion of the lodger, if the landlord do not sleep under the same roof. S. C. 2 East, 506.

THE house in which the offence was committed belonged to one *Nash*, who did not live in any part of it himself, but let the whole of it out in separate lodgings, from week to week. *John Jordan* had two apartments in the house, *viz.* a sleeping-room up one pair of stairs, and a workshop in the garret, which he rented by the week, as tenant at will to *Nash*. This workshop was the room broke open by the prisoner.

THE Jury found the prisoner *Guilty*: but the case was referred to the consideration of the JUDGES, upon the question, Whether, under the circumstances above-mentioned, the indictment could be supported for burglary in the dwelling-house of *John Jordan?*

ON the first day of Easter Term 1782, the TWELVE JUDGES assembled at LORD MANSFIELD'S Chambers; and ten of them were unanimously of opinion, That as *Nash*, the owner of the house, did not inhabit any part of it, the indictment had properly charged it to be the dwelling-house of *John Jordan*,

1782. the lodger (*a*); and they said, the case of *the King* v. *Rogers* (1) was precisely in point with the present case.

CARRELL'S CASE.

(1) *Ante*, Old Bailey, October Session 1772.

(*a*) The two other Judges thought that it was not the mansion-house of *Jordan*, but that it might have been laid to be the mansion-house of *Nash*: to which opinion some of the other Judges inclined, if it were not the mansion of *Jordan*, 2 East, 506. But see Trapshaw's case, *post*, August Session 1786.

CASE CXIX.

THE KING *against* JOHN PATCH.

To obtain property from another by the practice of *ring-dropping* is felony, if the Jury find it was obtained under a preconceived design to steal it.

S. C. 2 East, 678.
Kely. 24, 81.
Shower, 50, 57.
1 Hale, 507.
3 Inst. 108.
1 Sid. 254.
Raym. 276.
1 Hawk. P. C. 136, 137.

AT the Old Bailey in February Session 1782, *John Patch* was indicted before MR. JUSTICE GOULD, present Mr. BARON PERRYN, and MR. JUSTICE BULLER, for stealing a silver watch, a steel chain, a gold seal, two pieces of foreign coin, and seven shillings in money, the property of *Jeremiah Bumstead*.

THE prosecutor deposed, that the prisoner and two other persons who made their escape, had joined company with him in the street, and after walking a short space with him one of them stooped down and picked up a purse, which upon inspection was found to contain a ring, and a receipt for 147*l.* purporting to be the receipt of a jeweller for "a rich "brilliant diamond ring." The prisoner proposed that they should go into some public-house, to consider in what manner their respective portions of this prize should be divided, and accordingly they all four of them went into an ale-house on Saffron-hill. Various modes of distribution were suggested: at length the prisoner asked the prosecutor, if it would be agreeable to him to take the ring into his own possession, and to deposit his money and his watch as a security to return it upon receiving his portion of its value. The prosecutor assented to the proposal; and signed a written agreement, dictated by the prisoner, "That when the pri-"soner, or either of the other two men, returned the watch "and money, and *seventy pounds*, he would redeliver to "them the purse and the ring." The prosecutor accordingly laid the watch and money mentioned in the indictment

1782.

PATCH'S CASE.

upon the table, and received the ring. The prisoner beckoned the prosecutor out of the room, upon a pretence of speaking to him in private; and during this interval the other two men marched off with the property. The abrupt manner in which they went away made the prosecutor conceive that he had been defrauded, but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he should have his money and watch again; but he secured the prisoner, who then made proposals to him to make the matter up. The ring was valued at ten shillings.

It was objected by the prisoner's Counsel, that as the prosecutor had parted voluntarily with his property, it was *a fraud* only, and not *a felony;* but the Court, upon the authority of the case of *The King* v. *Pear* (1), referred it to the Jury to consider, Whether the whole transaction was not an artful and preconcerted scheme in the three men, feloniously to obtain the prosecutor's watch and money? And whether the prisoner and the other two men were not all in concert together to procure by such a pretext any man's money whom they might meet, and to embezzle it, or, in other ways to steal it.

(1) *Ante*, Old Bailey September Session, 1779.

The Jury found the prisoner guilty; and he was sentenced to raise gravel three years on the river Thames (*a*).

(*a*) The opinions of the three Judges who presided at the trial were founded on this, that the *possession* was obtained by fraud, and the *property* not altered; for the prosecutor was to have it again; and therefore it was not like the case of goods sold on credit where the buyer means immediately to convert them into money, and is not able, nor intends to pay for them; for there the buyer gets the absolute property by the act and consent of the owner, 2 East, 679. And at the Old Bailey in December Session 1783, *John Anderson* was tried before Mr. Baron Hotham, for stealing a watch, a chain, two seals and a guinea from *John Robertson*, by the practice of ring-dropping, and convicted on the authority of this case.

1782.

THE KING *against* GRIBBLE.

CASE CXX.

The offence of privately stealing from the person, cannot be committed on a person who has rendered himself senseless by intoxication.

S. C. 2 East, 704.

Vide Rex *v.* Thompson, *post*.

(1) See 48 Geo. III. c. 129. by which the 8 Eliz. c. 4. is repealed.

2 Hawk. P. C. 490.

AT the Old Bailey February Session 1782, an indictment on the statute 8 Eliz. c. 4. was preferred, charging the prisoner with having stolen a watch from *Thomas Sheridan*, privately from his person and without his knowledge.

THE prosecutor had been drinking at a public-house with the prisoner, and being both of them much intoxicated, they went together to the prisoner's lodgings, where the prosecutor fell asleep; and while he was asleep the prisoner stole his watch.

THE COURT ruled this not to be such a stealing privately as would oust the offender from the benefit of clergy, within the meaning of the legislature (1); and mentioned the following case as having been decided by the JUDGES:—A person who had become intoxicated at *Vauxhall Gardens* fell fast asleep in his way home, in one of the watch-houses or niches on *Westminster-bridge*. A waiter from Vauxhall also passing that way stole the buckles out of his shoes without waking him; and the JUDGES were of opinion, That the statute was intended to protect the property which persons by proper vigilance and caution should not be enabled to secure; but that it did not extend to persons who by intoxication had exposed themselves to the dangers of depredation, by destroying those faculties of the mind by the exertion of which the larceny might probably be prevented.

THE Jury found the prisoner guilty of stealing; but not privately from the person (*a*).

(*a*) At the Old Bailey December Session 1778, *Mary Reading* and *Mary Jones* were tried for privately stealing from the person. It appeared in evidence that the prosecutor a hackney-coachman, while he was waiting for his fare at the door of a brothel in Covent-garden, had laid himself down in the bottom of his coach with the door open and fallen asleep; and that the prisoners had rifled his pockets without waking him. THE COURT informed the Jury, that it was the opinion of the late MR. JUSTICE ASTON in a similar case, and with whose opinion they perfectly agreed, that this was not a case within the spirit of the Act of Parliament; for that it was evident from the preamble of it, that it was intended only for the protection of persons in public meetings, and places of proper resort.

1782.

GRIBBLE'S CASE.

Sed vide Thompson's case, post. But if the person whose pocket has been picked during his intoxication was put into that state of insensibility by the artifices of the offender, it is then within the statute. Therefore where one William Branny was tried on this statute before MR. JUSTICE BULLER, at the Summer Assizes for Carlisle 1786, and it appeared that Hugh M'Guinar the prosecutor was an illiterate Irish drover who sold cattle at Ravinglass Fair; where the prisoner, a total stranger to him, got acquainted with him under pretence of being his countryman; and having wormed out of him that he had received his money for his cattle, the prisoner and two of his companions followed him to Calder Bridge; where the prisoner insisted on lying with the prosecutor, which he did, but the latter having put his money in his fob, and fastened a pin across it, preserved it for that time; that the next morning the prisoner and his companion got up before the prosecutor, and had breakfast ready before he came down stairs; and they all breakfasted together, and then the prisoner and his companions proposed to have some brandy, and accordingly they had a great quantity, out of which it was contrived that the prosecutor should drink half; with which he was so intoxicated, that the landlord and his wife proposed putting him to bed, but the prisoner and his companion said they would take him with them; and accordingly they put him on a horse, and carried him above three hundred yards from the house, where the prisoner picked forty-three guineas and thirteen half-guineas out of his pocket without his knowledge, and left him in the road; the Jury found him guilty and also *that at the time he took the money the prosecutor was awake, but insensibly drunk:* THE JUDGES in Mich. Term 1786, (nine present) all held the conviction proper. Five of them held that the statute extended to all cases where goods were stolen from the person of another without his knowledge whether he was awake or asleep, drunk or sober, &c. The other four thought (see Thompson's case, *post*) that it did not extend to the case of a man who was asleep, but only to cases where some craft or cunning was used by the prisoner: but on account of the craft and artifice used by the prisoner, in this instance, they all agreed that his conviction was proper. GOULD J. said that the prisoner's whole conduct was *in fraudem legis.* 2 East, C. L. 704, 705.—But see 48 Geo. III. c. 129. by which the 8 Eliz. c. 4. is now repealed.

THE KING *against* ANN GUY.

CASE CXXI.

AT the Old Bailey in April Session 1782, *Ann Guy* was indicted as an accessary after the fact, in receiving *two guineas*, she well knowing them to have been stolen.

Money is not within the meaning of the words *goods or chattels*, in the statute 3 Will. and Mary, c. 9. and 5 Ann. c. 31.—S. C. 2 East, 748.

1782.

GUY'S CASE. Foster, 73, 378.

MR. BARON EYRE said he was clearly of opinion, That there cannot be an accessary after the fact for receiving *money*. The statutes of 3 Will. & Mary, c. 9. s. 4. and 5 Ann. c. 31. s. 5. say, That whoever shall buy or receive any *goods or chattels* that shall be feloniously stolen, knowing the same to be stolen, shall be deemed an accessary after the fact to such felony; but *money* cannot be well considered as *goods or chattels* within the meaning of these Acts.

THE prisoner was acquitted (*a*).

(*a*) One Margaret Davidson was tried at Carlisle Assizes 1766, for stealing 160*l.* in money in a dwelling-house, and Isabel and Margaret Carter were charged in one count with knowingly receiving the said money, and in another with knowingly harbouring and concealing the thief. It was objected that *money* is not within the statutes relating to the receiver of stolen *goods* and *chattels*: and MR. JUSTICE BATHURST, being clearly of that opinion, confined the evidence to the count for harbouring and concealing the thief: the prisoners were convicted, and the principal received Judgment of Death, but the accessaries had their clergy, and were burned in the hand. And in analogy to this it has been determined in the case of Rex *v.* Sadi and Morris, that *bank-notes* are not within the statute against such receivers, *post*, 525.—But *bank-notes* have been holden, by the operation of the 2 Geo. II. c. 25. to be within 12 Ann. c. 7. against stealing money, goods, &c. to the value of forty shillings out of the dwelling-house. See Dean's case, May Session 1796, Watson's case, December Session 1794, Owen's case, 1792, Campbell's case, January Session 1792.

CASE CXXII.

THE KING *against* WILLIAM PEDLEY.

FIRST CASE.

A tenant from year to year is not guilty of ARSON by burning the house of which he is in *possession*; (*a*) but if by firing his *own house* he thereby burn the house of *another*, he is guilty of the crime.—S. C. 2 East, 1026.—S. C. in Mr. Caldecott's Sessions Cases, 218.

THIS was a SPECIAL VERDICT found at the Spring Session for the county of the city of *Bristol* in 1782, on an indictment against *William Pedley* for Arson, tried before LORD ASHBURTON, Recorder. In the Easter Term following a *Certiorari* was granted on the motion of the prosecutor to re-

(*a*) But the law is now altered in this respect, by the statute 43 Geo. III. c. 58. See Rex *v.* Spalding, *ante*, page 218, and Rex *v.* Breeme, *ante*, page 220.

move the verdict, and a *Habeas Corpus* to bring up the prisoner; and it was argued in the Court of King's Bench in Trinity Term, 22 Geo. III.

THE INDICTMENT contained sixteen counts, in which the offence was respectively laid to be committed, 1*st*, against the common law; and 2*dly*, against the statute 9 Geo. I. c. 22. Several of the counts distinctly charged, That the prisoner did *set fire to* and *burn* the house of *Freeman Lucy*, and *Giles*. Other counts charged, That he *set fire* to his own house, *with intent* to *burn* the house of *Freeman Lucy*, and *Giles*, near to the prisoner's dwelling-house, by reason whereof the said house of *Freeman Lucy*, and *Giles*, was set on fire and burned. The neighbouring house was also laid to be the house, 1*st*, of *Francis Parry*; 2*dly*, of *Richard Coombe*; 3*dly*, of *the Mayor of Bristol*. The prisoner was also charged in some of the counts with burning his own house. The several *houses* were respectively termed *dwelling-houses*; and the offence laid throughout to have been committed feloniously, wilfully, and maliciously.

THE VERDICT.—"All the houses mentioned in the indictment were the freehold and inheritance of the Mayor of Bristol, who had demised that in which the prisoner dwelt to *Freeman Lucy*, and *Giles*, for the term of ninety-nine years, determinable with three lives. *Freeman Lucy*, and *Giles* had demised the said house to the prisoner for seven years, part of which term was subsisting. The Mayor of Bristol had also demised three other messuages adjoining to that in the possession of the prisoner to *Richard Coombe* for a term of ninety-nine years, determinable as aforesaid; and *Richard Coombe* had again demised the said three messuages to *Francis Parry* for a year, and so from year to year, so long, &c. On 29th September 1780, *Francis Parry* demised one of these three messuages to *John Landy* for three months, who entered and continued in possession *until* and *upon* the 8th December 1780; and this is the house that is alleged in the indictment to be the house of *Francis Parry*. The *prisoner* and *John Landy* being thus in possession of their respective houses,

1782.

PEDLEY'S CASE.

" so demised as aforesaid, the prisoner, on the 6th Decem-
" ber 1780, unlawfully, wilfully and maliciously set fire to,
" and set on fire the said house in *his* possession, with intent
" wilfully and maliciously to burn the same, and did thereby
" burn and destroy great part of the same; and by means
" thereof the said fire was communicated to the house in the
" occupation of *John Landy*, and burned and consumed part
" thereof. But whether upon the whole of these facts the
" prisoner is guilty of the offences charged in the indictment,
" the Jury submit to the Court."

LAWRENCE, *for the Crown*, said, that three questions might be made from the facts disclosed by the Special Verdict. *First*, Whether the prisoner was not guilty of Arson at common law, or under the statute of 9 Geo. I. c. 22. in burning a house of which he had a term in possession, however small the extent and duration of his interest therein might be? *Secondly*, Whether a man who sets fire to his own house under circumstances that shew *general malice* is guilty of Arson, if such fire spread and burn a house adjoining? *Thirdly*, Whether the adjoining house ought to have been expressly charged to have been the property of *John Landy*, the actual occupier? MR. LAWRENCE acknowledged, that as to the *first point*, notwithstanding the opinion of a great writer upon Crown Law to the contrary, he was apprehensive that the doctrine in *Holmes's Case*, *Cro. Car.* 533, upon this subject, had been too firmly and recently established, for any arguments he could use *ab inconvenienti* to remove. In *Breeme's Case* (1), in the year 1780, it was determined by nine of the JUDGES, that a man is not guilty of felony in setting fire to his own house; and in *Spalding's Case* (2), about the same time, it was determined with equal unanimity, that the statute 9 Geo. I. c. 22. had created no new offence. He therefore confined his arguments to the *second question*, " Whether the prisoner's having burnt his neighbour's house " by means of burning his own, was not an offence within " the legal idea of ARSON?" And he contended, that where a man doth an act *malum in se* wilfully and deliberately, and such act occasions a mischief which if it had been immedi-

(1) Old Bailey April Session 1780, *ante*, page 220.

(2) Bury Assizes 1780, *ante*, page 218.

1782.

PEDLEY'S CASE.

ately done would have been felony, the act which produced such mischief shall also be considered as felonious. "If *A.* "tenant for years of a house, set fire to it, intending to "burn the house of *B.* and thereby he does burn the house "of *B.* this is felony; but if he doth not burn the house "of *B.* it is only a great misdemeanor, but no felony." 1 *Hale, P. C.* 568. *Dalton, ch.* 158. *p.* 506. *Edit.* 1727. "It seemeth," says *Dalton, ch.* 105. *p.* 270. "That if a man "unlawfully shoot in a hand-gun, and the fire thereof sets "another man's house on fire, and burn it down, it is felony "(1)." 3 *Inst.* 67. *Kely.* 117. 1 *Hawk. ch.* 106. *s.* 5. 4. *State Trials*, 222. Cases of murder constantly proceed upon this principle; and wherever death follows an act which is *malum in se*, and the event was probable from the act, the actor is answerable in *felony* for the consequences; for MR. JUSTICE FOSTER says, it is no excuse for the aggressor to say, that he did not intend all that follows. As to the *third point*, viz. that the adjoining house was not stated in any count to be the property of *John Landy*, he contended, that as it was laid to be the house of the Corporation of Bristol, and also of *Coomb*, their immediate lessee, that was sufficient; for except the *occupier*, it was stated to be the property of every other person intended therein, and that in point of law, the possession of the tenant was the possession of the landlord.

(1) *Sed vide* 1 Hale, 569. *contra.*

LORD MANSFIELD, stopping COWPER, who was to have argued on the other side: The law is now established and settled, that if a tenant set fire to the house of his landlord, he is not guilty of Arson. The legal definition of this crime is burning the house of *another*; and it was lately determined in *Breeme's Case*, by the unanimous opinion of NINE JUDGES, that it is not felony to burn a house of which the offender is in *possession* by virtue of a *lease for years*; and this was also the title in *Holmes's Case*, which is now confirmed to be good law. I very much lament that the law is so settled. If it had been a new question, I should not have been *singly* of a contrary opinion. The bias of my mind is in favour of MR. JUSTICE FOSTER'S opinion, that "The house might with strict

1782.

PEDLEY'S CASE.
The Case of Eliz. Harris, Fost. 115, 116.

" legal propriety have been considered as the house of the " landlord;" and although he truly says, " that *both* landlord " and tenant have a property in the house, the one temporary " and limited, the other absolute and perpetual;" yet to decide that he who has so trifling an interest in a house as a year, a month, or a day, should not be guilty of Arson by burning it, would, in my conception, require great deliberation (*a*). But as to that point of the present case, it is firmly settled, and the legislature alone can alter it. As to the third point, there is no doubt but that the propositions laid down are grounded upon the true principles of law, when applied to certain cases; but whether the present is a case in which they ought to prevail, it seems immaterial to enquire; for the crime of Arson, as I have said before, is an offence committed against *the possession of another*; and *Pedley* has not been tried for burning the house of which *John Landy* was in *possession*, because, though in fact it was the house burned, the indictment has stated it to be in the possession of *Richard Coombe* (1).

(1) See Holmes's Case, Cro. Car.

WILLES, ASHHURST, and BULLER, Justices, concurring, judgment was given for the prisoner; but as he had not been tried for the fact found, he was remanded.

(*a*) At the Bury Summer Assizes 1786, William Gowen was convicted before L. C. B. SKINNER, of Arson. The house he burned was rented by one Richard Dobney, named in the first count as the owner, and let by him from year to year to the parish officers of Laxfield, who paid the rent for it, and who were, at the time of burning the house, the persons named (individually) in the third count of the indictment. The prisoner was a parish pauper, and had been put into the house by the overseers to live there. He had the sole possession and occupation of it without paying any rent, and was resident therein with his family at the time the fact was committed: and on reference to the Judges they all held that the prisoner had no interest in the house, but was merely a servant, and therefore it could not be said to be *his* house; but that the overseers had the possession of it by means of his occupation; and they accordingly held that he had been properly convicted. 2 East C. L. 1027.

1782.

THE KING *against* WESTON. CASE CXXIII.

AT the Old Bailey in July Session 1782, *Joseph Weston* was tried before MR. JUSTICE HEATH, on the statute 9 Geo. I. c. 22. for maliciously and feloniously firing a loaded pistol at *John Davis*, against the form of the statute, &c.

What is sufficient evidence on an indictment on 9 Geo. I. c. 22. for maliciously firing at another, that the pistol was loaded with a leaden bullet.

THE prisoner and his brother *George Weston*, both of whom had recently before lived in great splendor at credit, at the Priory at *Winchelsea* in *Sussex*, had, on Wednesday 17 March 1782, been apprehended and committed to Newgate, on a charge of having robbed the Bath and Bristol Mail, on the 29 January 1781, near the eleventh mile stone, between *Maidenhead* and *Hounslow*; and on their trial in May Session 1782 for this offence, it appeared that they had for the last year lived under different names in various places, both in town and country, and had negotiated several of the bills and bank-notes, that had been sent from Bristol by the mail that was robbed; but as the post-boy who drove the mail was then dead, their persons as to this robbery could not be identified, and they were acquitted of this charge. But *George Weston* having procured cash for one bank post bill of £40 payable to Mr. *Thomas Atkinson* or order, on which he had forged the name of *John Ward* at the Dun Horse in the Borough, he was tried for this offence and convicted. While this trial was going on, *Joseph Weston*, the present prisoner, who had been ordered to remain in *Newgate*, contrived on Tuesday 9th July 1782, to escape from the prison, but the moment he was out he was perceived and pursued by *John Owen* the under turnkey towards *St. Sepulchre's Church*, through *Smithfield* and down *Cock Lane*, calling out to every person that he passed to stop him. A man of the name of *John Davis*, who was at this time going up *Cock Lane*, caught hold of him with his left hand; upon which the prisoner exclaimed with an oath, "*Let me pass or I will blow your brains out*," and immediately fired a pistol which he had in his hand, over *Davis's* arm, and wounded him in the neck and chin; but

See now 43 Geo. III. c. 58. and Rex *v.* Empson, *ante*, page 224, case 112

1782.

WESTON'S CASE.

whether these wounds were given by the wadding or by a ball did not appear, except only that *Davis* said that he apprehended they must have been given by a ball, from the sensation he felt at the time, and because it took him in one place. But it appeared from the testimony of one *James Wallace*, who had before caught hold of the prisoner as he was running down the lane, but who had let him go again on his presenting the pistol to his forehead, and who was close by when *Davis* stopped him, that the pistol was presented at *Davis*'s head when it was fired; that it went off by the prisoner pulling the trigger, and not by accident, during the scuffle; and that it made a very strong report, for so small a pistol.

IT was contended that there was not sufficient evidence in this case, that the pistol was loaded with a leaden bullet; but

THE COURT thought there was sufficient evidence of that fact to go to the Jury; and

THE JURY found the prisoner *Guilty*.

CASE CXXIV.

THE KING *against* HENRY LOVELL.

In an indictment of forgery, a description to a common intent of the person intended to be defrauded is sufficient. S. C. 2 East, 990.

AT the Old Bailey in September Session 1782, *Henry Lovell* was indicted on the statute 7 Geo. II. c. 22. for forging an order for the payment of money.

THE indictment stated "That *Henry Lovell*, late of *Covent-*
" *garden* in the County of *Middlesex*, Labourer, on the 25th
" August 1782, with force and arms, &c. feloniously did
" falsely make, forge and counterfeit, &c. a certain order for
" payment of money, PURPORTING to be an order under the
" hand of *Henry Hervey Aston*, and directed to Messrs.
" *Drummond and Company, Charing-cross*, by the name of (*a*)

(*a*) MR. JUSTICE BULLER, and other Judges were of opinion, in consulting on this case, that if the words "Messrs. *Drummond and Company, Charing-cross by the name of*" had been omitted, and the indictment had only stated

1782.

LOVELL'S CASE.

" Mr. *Drummond, Charing-cross*, by which said order for " payment of money the said Messrs. *Drummond and Com-* " *pany* were required to pay the bearer or order, on demand, " the sum of Ten Pounds and Ten Shillings, and place the " same to account, which said order for payment of money " is as followeth (that is to say)

Mr. Drummond,
Charing-cross.

" 25 August 1782.

" Please to pay the bearer or order, on demand, the sum " of Ten Pounds Ten Shillings, and place it to account

" Per me, H. H. ASTON.

" *No.* 12, *Lower Seymour-street,*
" PORTMAN-SQUARE.

" with intention to defraud the said *Henry Hervey Aston,* " against the form of the statute, &c."

THERE was a second count for uttering the said order, knowing it to be forged, with the like intention; and two other counts charging these offences to have been committed with intention to defraud *Robert Drummond, Henry Drummond, George Drummond, and Andrew Berkley Drummond.*

THE prisoner was convicted upon very clear evidence; but it was moved in arrest of judgment, that the indictment charged the note to be drawn on *Drummond and Company* by the name of Mr. *Drummond, Charing-cross*, whereas the names of Mr. *Drummond*'s partners should have been severally set forth in the indictment; for that describing it as PURPORTING " to have been directed to Messrs. *Drummond, and Company,* " by the name of Mr. *Drummond, Charing-cross,*" was not such a certain description of persons as the law in this case required.

UPON this motion the judgment was respited, and the point of law submitted to the consideration of the JUDGES.

MR. BARON HOTHAM, in the December Session following,

according to the fact, that the bill was directed to Mr. Drummond, Charing-cross, it would have been sufficient. 2 East, C. L. 991.

1782.

LOVELL'S CASE.

delivered the opinion of the JUDGES to this effect: THE TWELVE JUDGES, in deciding upon this question, have considered the import and operation of the words "Messrs. "*Drummond and Company, Charing-cross.*" For the question in this case is, whether any person or persons are described by the words Messrs. *Drummond and Company*, or whether they are totally unintelligible, and a description of nobody. The rule of law upon this subject is, that every averment necessary in an indictment must be stated with such a degree of certainty as will enable the party to learn the general nature of the crime he is accused of, and who are the accusers against whom he is to defend himself. If therefore, in the present case, the designation of person is expressed with sufficient certainty for this purpose, without calling in aid the words "*and Company,*" in which words the uncertainty complained of is supposed to reside, those words may be rejected as superabundant and unnecessary, and the indictment will be good without them. But if they are essential to the certainty of description, and cannot be rejected as surplusage, and the words "Messrs. *Drummond* "*and Company, Charing-cross,*" when taken together, are so senseless and unintelligible as not to import a certain description of persons, then the indictment will be bad. On the first point the JUDGES are of opinion, That as "Mr. *Drummond, Charing-cross,*" would have been sufficiently descriptive of the person intended to be defrauded, the words "*and Company*" may be rejected as surplusage, without vitiating the indictment. They are also of opinion, That without expunging these words, the sentence "Messrs. *Drum-*"*mond and Company, Charing-cross,*" is sufficiently intelligible to convey with legal certainty a notification of the party intended to be defrauded, and that it is not necessary in this part of the indictment to describe the party meant with more particularity; for if any person can be intended from the words, who that person is, and whether he was the meditated object of the fraud, are matters for the consideration of the Jury. The verdict in the present case, has established the fact, that the prisoner intended to defraud "Messrs. *Drum-*

" *mond and Company of Charing-cross;*" and therefore on all these grounds the JUDGES are unanimously of opinion, That the indictment is good, and of course that the judgment ought not to be arrested (1). 1782. LOVELL'S CASE.

THE prisoner accordingly received sentence of death; but he was afterwards *pardoned* on condition of transportation.

(1) See 8 Term Rep. 508, that a conviction on the excise laws, under the title, and against persons described " Harrison and Company," cannot be supported.

THE KING *against* WILLIAM BASS. CASE CXXV.

AT the Old Bailey in May Session 1782, *William Bass* was convicted of stealing a quantity of goods, the property of *John Gatfee.*

If a servant to whom goods have been delivered by his master to carry to a customer, sell them and convert the money to his own use, he is guilty of felony; for the possession is not out of the master by such delivery. S. C. 2 East, 566, 698.

THE prisoner was servant and porter in the general employ of the prosecutor, a gauze-weaver in Bishopsgate-street. On the day laid in the indictment he was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. In his way he met two men who invited him into a public-house to drink with them and then persuaded him to open the package and sell the goods to a person whom one of the men brought in, which he accordingly did, by taking them out of the package and putting them into the man's bag; and he received eight guineas of the produce to his own use.

IT was referred to the consideration of the TWELVE JUDGES, Whether from the above facts, the prisoner was guilty of a felonious taking?

MR. BARON HOTHAM in December Session 1782, delivered it as the unanimous opinion of all the JUDGES, That the conviction was proper; for the prisoner standing in the relation of a servant, the *possession* of the goods must be considered as remaining in the master (1) until and at the time of the unlawful conversion of them by the prisoner. The master was to receive the money for them from the customer, and he could at any time have countermanded the delivery

(1) See Wilkins's case, *post*, April Session 1789.

1782.

BASS'S CASE.

of them (*a*). The prisoner, therefore, by breaking open the package, tortiously took them from the *possession* of the owner, and having by the sale converted them *animo furandi* to his own use, the taking is felonious.

MANY cases of this kind have occurred, and all of them have been determined to be felony (*b*).

(*a*) See Vale *v.* Bayle, Cowp. 294, 296.

(*b*) At the Old Bailey in October Session 1664, a prisoner was indicted for stealing a quantity of silk, the property of his master, who was a Silk-Throwster. It appeared in evidence that the Silk-Throwster had men come to work in his own house; that the prisoner was one of them; that he delivered silk to him to work, and that he stole part of the silk so delivered to him; and HYDE, Chief Justice, MR. JUSTICE KELYNGE and MR. JUSTICE WILDE, agreed that this was felony, notwithstanding the delivery of the silk to the party; for it was delivered to him *only to work*, and so the entire property remained then only in the owner; like the case of a Butler who has plate delivered to him, or a Shepherd who has sheep delivered, and they steal any of them, that is felony at common law. Kely, Rep. 35. And so says the same author, page 82. If one deliver goods to a porter in *London* to carry to a certain place, and he taketh them and carrieth them away to another place, and there openeth and disposeth of them, it is felony; and he cites in support of this decision the Year Book, 13 Edw. 4. fo. 9. pl. 10, a cause determined by the Twelve Judges in the Exchequer Chamber, which was thus: one person bargained with another to carry certain bales of goods and other things to *Southampton*, and he took them and carried them to another place, and broke open the bales, and took the goods contained therein feloniously, and converted them to his own use, and disposed of them suspiciously; and this was held to be felony; for that notwithstanding the delivery, the property remained in the balors.

1783.

CASE CXXVI.

THE KING *against* WHITE.

The name of the owner of the house is essential in an indictment for *burglary*, and for *stealing in the dwelling-house*.

S. C. 2 East, 513, 780.

AT the Old Bailey February Session 1783, the prisoner was indicted before Mr. JUSTICE BULLER and Mr. JUSTICE GROSE, for burglary in the dwelling-house of *John Snoxall*, and stealing therein goods, the property of *Ann Lock*.

IT appeared that it was not the dwelling-house of *John Snoxall*; and it was therefore held, that the prisoner could not be found guilty either of the burglary, or of stealing to

the amount of forty shillings in the dwelling-house, under the 12 Ann. c. 7. for it is essential in both cases to state in the indictment, *the name* of the person in whose house the offences are committed (*a*). 1783. WHITE'S CASE.

(*a*) In October 1785, *William Woodward* was indicted for stealing, in the dwelling-house of *Sarah Lunns*. It appeared in evidence, that her name was *Sarah London*. MR. SERJEANT ADAIR, Recorder, held the variance fatal to the capital part of the indictment.

THE KING *against* PATRICK AND PEPPER. CASE CXXVII.

A corporation must prosecute in their corporate name; and the addition of such name as a description of the *persons* of which the corporation is composed, is not sufficient in an indictment. 2 East, 1059.

AT the Old Bailey in February Session 1783, *Aaron Patrick* and *John Pepper* were indicted before MR. JUSTICE BULLER, present MR. BARON PERRYN, on the statute of 6 Geo. III. c. 48. for cutting down in the night-time trees growing in *Enfield Chase*.

THE first count in the indictment laid the property as "belonging to *Joseph Brown*, *George Cook*, and *William* "*Sedcole*, then being the churchwardens of Enfield afore- "said, &c. they the said *Joseph Brown*, *George Cook*, and "*William Sedcole*, then being the owners of the said trees," &c. The second count laid the property to belong to the same persons by name, "they the said *Joseph Brown*, *George* "*Cook*, and *William Sedcole*, then being the churchwardens "of the parish church of Enfield, in the county of Mid- "dlesex."

BY the statute 17 Geo. III. c. 17. for dividing Enfield Chase, a certain allotment of the land is vested in the churchwardens of Enfield for the time being, and their successors for ever, in trust for the owners and proprietors of freehold and copyhold messuages, lands, and tenements, within the parish, who were intitled to a right of common, &c. within the Chase. And by sect. 115, the churchwardens are incorporated by the name of "*the churchwardens of the parish* "*church of Enfield, in the county of Middlesex.*"

1783.

PATRICK AND PEPPER'S CASE.

PECKHAM and MINGAY, for the prisoners, submitted to the Court, that a conviction could not be sustained upon this indictment; for that instead of laying the trees to be the property of the corporation, by their public name, it had laid them to be the property of the individual members composing such corporation, by their private names.

SILVESTER and FIELDING, for the Crown, contended, that as the Act of Parliament had vested the property in the churchwardens for *the time being*, it was necessary for the sake of certainty to mention their names; but admitting the insertion of their names to be unnecessary, and supposing them expunged as superabundant, the indictment would still remain good; for that the first count would then lay the property as belonging to "*the churchwardens of Enfield;*" and the second count, pursuing the words of the statute, would lay it technically as belonging to "*the churchwardens "of the parish church of Enfield, in the county of Middlesex;*" which is the very name by which the legislature has described their corporate capacity.

THE COURT held the objection to be fatal. The indictment would have been clearly right, if the first clause of the Act of Parliament which vests the property in the churchwardens for the time being had stood single. But the clause which gives the churchwardens a corporate capacity, and a corporate name, puts an end to the question; for where any description of men are directed by law to act in a corporate capacity, their natural and individual capacity as to all matters respecting the subject of their incorporation is totally extinct. The present indictment describes the trees to be the property of certain *individuals*, by their names; but the Act of Parliament shews the property to be in the *corporation*. If an action were brought in the private names of the present prosecutors for any matter relating to their public capacity, they must unavoidably be nonsuited; and, *à fortiori*, it must be erroneous in a criminal prosecution. But it is said that the private names may be expunged as surplusage. In the first count, supposing them expunged, the re-

maining description would be, " *the churchwardens of En-* 1783.
" *field,*" which is not the name of the corporation; and therefore that count would still be wrong. In the second count, it is true, the corporate name is used; but the property is not laid to be in the corporation of that name, it is laid to be in the private persons, and the public name is used merely as a description of those persons. The prisoners must therefore be discharged on this indictment.

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See Sherrington and Buckley's Case, O. B. Feb. Session 1789, *post*, and the Case of Rex *v.* Croke, Cowp. 29.

THE KING *against* FRANKLYN.

CASE CXXVIII.

IN the King's Bench in *Hilary Term*, 23 Geo. III. a rule was granted to shew cause why a writ of *Habeas Corpus* should not issue to bring up the defendant, who had been committed to *Norwich gaol* under the statute 19 Geo. II. c. 34. s. 1. by a warrant stating, that he, with others armed, had aided and assisted in rescuing uncustomed goods, and had assaulted and wounded and maimed an officer of the excise in the execution of his duty.

In an unlawful assembling under the 19 Geo. II. c. 34. for rescuing smuggled goods, it is not necessary that every individual should be armed.

THE words of the statute are, " That if any persons, to " the number of three or more, armed with fire-arms, or " other offensive weapons, shall be assembled in order to be " aiding and assisting in the illegal exportation of wool or " other goods prohibited to be exported, or in the carrying of " wool or other such goods in order to such exportation, " or in the running, landing, or carrying away prohibited or " uncustomed goods, or goods liable to pay any duties " which have not been paid or secured; or in the illegal " relanding of any goods whatsoever, which have been " shipped or exported upon debenture or certificate: or in " rescuing or taking away the same after seizure from any " officer or officers of the customs or excise, or other his " Majesty's revenue, or other person or persons employed " by him or them, or assisting him or them, or from the " place where they shall be lodged by him or them, &c. or " in case any persons to the number of three or more, so

S. C. Cald. 244.—But see 45 Geo. III. c. 121. s. 11.

See Hutchinson's Case, *post*, Sept. Session 1784, for the manner in which these several clauses of the Act shall be expounded.

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" armed as aforesaid, shall be so aiding or assisting; or if " any person shall have his face blacked or wear any vizard, " mask, or other disguise, when passing with such goods, or " shall forcibly hinder, obstruct, assault, oppose, or resist " any of the officers of the customs or excise, or other his " Majesty's revenue, in the seizing or securing any such " goods; or if any person or persons shall maim or dan- " gerously wound any officer of the customs or excise, or " any other his Majesty's revenue, in his attempting to go " on board any ship or vessel within the limits of any of the " ports of this kingdom, or shoot at, maim, or dangerously " wound him when on board such ship or vessel, and in the " due execution of his office or duty; then every person so " offending shall be adjudged guilty of felony without benefit " of clergy."

THE objection was, that the commitment did not state that the prisoner was *armed*, but only that he did certain acts with *others armed;* and therefore it did not appear that he was charged with any offence within the Act, which says, " that in case any person so armed with fire-arms or other " offensive weapons," &c.

THE ATTORNEY-GENERAL shewed cause against the rule, and contended, that it was not necessary within the meaning of the Act, that every person assembled should be individually armed; but that if a person be present, active, and concerned in the riotous proceedings which the legislature meant to prevent, he is within the Act: and he cited a case on the Black Act, in which it was contended, that when the face was covered with crape, or a black mask used, it was not having " a face blacked " within the meaning of the Act, but that the distinction was over-ruled.

PARTRIDGE, for the prisoner, cited the preamble of the Act, which says, " Whereas divers dissolute persons " have associated themselves, and entered into confedera- " cies to support one another, and have appeared in great " gangs, *carrying fire-arms or other offensive weapons, &c.* " and several officers of the customs and excise have been

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" wounded, maimed, and some of them killed by the said " persons so associated and assembled as aforesaid;" and contended that it was clear that the legislature meant persons with arms in their hands; and therefore, that the charge of *maiming*, as stated in the commitment, would not sustain it.

LORD MANSFIELD. The prisoner does not deny by his affidavit, that he was there with armed persons; and if he was active, it is not necessary under this Act that such individual should be armed.

Sed vide Fletcher's Case, 2 Strange, 1166. and note (*a*) to Hutchinson's

Case, *post*, Sept. Session, 1784.

THE KING *against* HAWKESWOOD.

CASE CXXIX.

AT Worcester Lent Assize 1783, the prisoner was indicted for forging a negotiable bill of exchange, purporting to be drawn by one *Prattington* on Sir *Robert Herries and Co.* AND ALSO, for forging two indorsements on the same; the one in the firm of *Cox and Devy*, the other in the name of *James Haden*. There were also the usual counts for uttering it, knowing it to be forged.

In an indictment for forging a bill of exchange, the bill may be given in evidence, although it be not stamped pursuant to 23 Geo. III. c. 49. S. C. 2 East, 955. See 2 Term Rep. 606.

THE fact of its being a forgery, and that the prisoner had negotiated it with a complete knowledge of that fact, were very clearly proved; but upon producing the bill in evidence, it appeared not to be stamped pursuant to the statutes of 22 Geo. III. c. 33. 23 Geo. III. c. 49. s. 14. and 23 Geo. III. c. 58. s. 11. which enact, " That no bill " of exchange, &c. not stamped as those Acts direct, shall " be pleaded or given in evidence in *any* Court, or admit- " ted in *any* Court to be good, or available in law or " equity."

See 24 Geo. III. Sess. 1. c. 7.

BALDWIN, the prisoner's Counsel, submitted to the Court, that the instrument in question, even supposing it to be genuine, was not a lawful *bill of exchange*, but a piece of waste paper, incapable of becoming the subject of either a

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fraud or felony; that the party who took it, must at the time have known that it was not a legal *bill of exchange*, or he must have been grossly negligent, for the defect is visible on the face of it.

MR. JUSTICE BULLER, who tried the prisoner, held, that the Stamp Acts above mentioned being revenue laws, and not purporting to alter the crime of forgery, could not affect the present question; and the Jury found the prisoner *Guilty:* but being a new point he respited the judgment, and reserved the case for the consideration of the JUDGES.

(1) But see the Case of Whitwell *v.* Dimsdale. Peake's *nisi prius*, page 167, 168.

IN Easter Term 1783, the JUDGES (1) over-ruled the objection, and determined that the conviction was right (*a*); for the Stamp Act, in saying that a bill without a stamp "shall not be pleaded or given in evidence, or be available "in law or equity," means only that it shall not be made use of to recover the debt: besides, by the present Stamp Acts, the holder of a bill is authorized to get it stamped after it is made (*b*).

(*a*) In January Session 1784, *John Lee* was indicted for forging a bill of exchange, purporting to be made by *Lord Townshend*, Master-General of the Ordnance; and an objection was taken against producing it in evidence, because it was not stamped; but upon the authority of this decision, the objection was over-ruled; and the prisoner was condemned and executed. See also the Case of *Collin Reculist*, *post*, January Session 1796.

(*b*) But now see 31 Geo. III. c. 25. s. 19. *contra*. At the York Summer Assize 1795, one Morton was indicted for knowingly uttering a forged promissory note, which, on being produced in evidence, appeared to have been drawn on unstamped paper; and the case was saved for the opinion of the Judges, as well on the principal point as on the statute 31 Geo. III. c. 25. s. 19. which passed after Hawkeswood's case, which prohibits the stamp to be afterwards affixed. The question underwent much consideration, and was debated by the Judges in Michaelmas Term 1795, and in Hilary and Easter Term 1796. Two or three of the Judges doubted at first the propriety of Hawkeswood's case, if the matter were *res integra*, yet they all agreed that, that case being an authority in point, they must now be governed by it; and that the statute 31 Geo. III. c. 25. s. 19. made no manner of difference in the question: and most of the Judges maintained the principle in Hawkeswood's case to be well founded; for they held that the acts of parliament which had been referred to and relied on,

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being mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for the purpose of recovering on it in a Court of Justice; but it might be received in evidence for collateral purposes; and instanced the 6th and 10th sections of the Act which made the party drawing such a bill liable to the statute duties, and to a penalty of 20*l.* in both which cases the bill must be used in evidence: that to constitute forgery it was not necessary that the instrument should be available: that though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him: that if this were a sufficient defence, forged securities might be published on improper stamps with impunity, which would carry the mischief to an alarming extent: that the stamp itself might be forged, and it would be a strange defence to admit in a Court of Justice, that because a man had forged the stamp he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. 2 East, C. L. 955, 956.

THE KING *against* THOMAS MILLS.

CASE CXXX.

What shall be considered as *lying in wait* under the Coventry Act. S. C. 1 East, 397. See the 43 Geo. III. c. 58.

AT the Old Bailey in April Session 1783, *Thomas Mills* was indicted before MR. BARON EYRE, on 22 and 23 Car. II. c. 1. commonly called *The Coventry Act*, for that he with force and arms, on purpose, and of malice aforethought, and by *lying in wait*, on the 29th March preceding, unlawfully, feloniously, and maliciously did make an assault on one *Thomas Brasier*, with intent to maim and disfigure the said *Thomas Brasier*, and with a knife unlawfully and feloniously did slit his nose, with intention to maim and disfigure the said *Thomas Brasier*, against the statute, &c.

THE following facts appeared in evidence: *Thomas Brasier* was carman to *Barwis and Co.* wholesale grocers on *Snow-hill*. About the time this offence was committed, large gangs of robbers and pickpockets infested this quarter of the metropolis, and committed almost nightly the most daring and wanton outrages upon persons walking along the streets. About eight o'clock at night, on the day laid in the indictment, *Brasier* was driving his cart, loaded with lumps of

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sugar, down *Holborn-hill*, a little beyond St. Andrew's church, in his way to *Snow-hill*, when a person suddenly struck him a blow on the face, while several others surrounded him, making uncommon noises, and throwing great stones at him; but he got to the tail of the cart, which continued to go on, and with the stretch-staff defended himself as well as he could against their attacks, until he came near to the house of a Mr. *Furneaux*, opposite to *Fleet-market*, where they surrounded him with increased numbers, struck him several times on the head and shins, stabbed four holes in his coat, gave him several severe wounds in different parts of his body, and one through his ribs, when, being almost exhausted and no longer able to defend himself, he endeavoured to take shelter in Mr. *Furneaux*'s house; but two women, who were part of this formidable gang of thieves, intercepted his passage, and prevented him. While he was standing in this situation on the foot-pavement, holding up his stick to defend his head from their blows, but without striking any of them, several of them repeatedly called out, "*Damn you, where are your knives?*" upon which the prisoner, who was also one of the gang, made a sweeping stroke at him with *a large knife*, from one ear to the other, which cut the right side of his face, divided the upper part of his nose, (that is, the part which separates the two nostrils,) and laid open his cheek in such a manner that his teeth and gums might be seen through the wound quite from his nose to his ear, and the nose was cut quite through; the *septum* divided, each nostril touched, and the gristle laid down, the whole laying over his chin. It appeared also that he had two other cuts on the left side, by one of which part of the left ear had been taken off, and by the other a wound made underneath it. The sufferer could assign no other cause for this violent and cruel treatment, except that it was intended by way of revenge against him for having detected and beat off some thieves who had made an attempt to rob his cart near the same place on the preceding evening; for it could not be for the purpose of robbing the cart this evening, as none of the sugar was taken away.

THE COURT to the Jury. This prisoner stands charged with an outrage committed upon the person of *Thomas Brasier;* and the indictment brings that charge within the scope of the 22 and 23 Car. II. c. 1. commonly called *The Coventry Act*, which was made on a particular occasion, when certain armed men had *laid in wait* for *Sir John Coventry*, a man of rank and consequence at that time, who had given offence to somebody, with an intention to wound and disfigure him, and which intention they carried into effect by slitting his nose and giving him other wounds and maims, so as not only to disfigure his person, but greatly to endanger his life: The statute, after reciting this particular transaction, enacts, "That if any person shall, on purpose "and of malice aforethought, and by lying in wait, unlaw- "fully cut out or disable the tongue, put out an eye, slit "the nose, cut off the nose, or cut off or disable any limb "or member, with intention in so doing to maim or dis- "figure in any manner afore-mentioned, such person shall "be guilty of a capital offence (*a*)." This charge therefore is of a higher nature than a mere outrage of one person upon another; and the merely wounding a man, assaulting him, and slitting his nose, or otherwise wounding him, would, if unattended with the circumstance of being done maliciously by lying in wait with intention to maim and disfigure, be a misdemeanor only, unless the wound amounted to *a maim*, and then it would be a different offence. To constitute therefore the present offence, it must be committed with a certain degree of preparation, watching an opportunity for the purpose, and with a certain degree of deliberation that may mark a malicious intention, and a wilful design to commit this act of cruelty; for the charge is, that the pri-

(*a*) By 43 Geo. III. c. 58. If any person shall *stab* or *cut* another with intent to murder, rob, maim, disfigure, or disable such person, or with intent to do some other grievous bodily harm to such person; or with intent to obstruct, resist, or prevent the lawful apprehension or detainer of any of his accomplices for any offence for which he may be liable by law to be apprehended, imprisoned, or detained, he shall be guilty of felony without benefit of clergy.

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soner wilfully, deliberately, maliciously, on purpose, and by lying in wait, slit the nose of *Brasier*, with intent to maim and disfigure him. The evidence leaves it very difficult to make out what motive these people, be they who they may had for attacking him in this outrageous and cruel manner he conjectures it was for the reason he stated, namely, for purposes of revenge, and with a view *to mark* any man who should be so vigilant a servant as to prevent his master's property from being plundered, in order that other servants might be prevented from impeding their depredations; but whether that was their object or not, or whether it was a sudden, violent impulse of rage, or some sudden quarrel, the particulars of which are undisclosed, is one of the questions you have to determine. Certain it is, that every riotous outrage that is committed on a man is not within the statute. The next question will be as to the deliberation, preparation, premeditated malice, and intention to do this sort of mischief; and the evidence leaves this part of the case equally dark, except indeed so far as the expression, "*Where are* "*your knives?*" is explanatory of their design; for if that was *the signal* that was to be given to them, and the prisoner drew his knife and *took the first opportunity* to give *Brasier* the cut which he received, this is *lying in wait* for him; for a man who has a purpose in his mind to do such kind of mischief, and deliberately watches an opportunity to do it, I think lies in wait; for it is not necessary that a man should place himself in any particular concealment, and then rush out of his lurking-place to do it; if he form such an intention, and come up behind the man he means to injure, and take an opportunity of doing the premeditated deed, it is lying in wait; and that circumstance need not be stretched to any particular length of time, or to any extraordinary degree of preparation, provided he seizes a convenient opportunity of doing it, and does it with deliberation. The learned JUDGE then said, that if, under all the circumstances of the case, the Jury should think that it was the effect of some sudden impulse, and not of deliberation or malice,

See Rex *v.* Barney Carroll, Old Bailey July Sess. 1765, *ante*, page 55, case 31.

they must acquit him; for that if he were not guilty to the extent charged in the indictment, he was not guilty at all.

THE JURY found the prisoner *Guilty*.

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THE KING *against* JANE WARICKSHALL. CASE CXXXI.

Confessions obtained in consequence of *promises* or *threats* cannot be given in evidence; but any *facts*, though resulting from such inadmissible confession, may be received. S. C. 2 East, 658.

AT the Old Bailey in April Session 1783, *Thomas Littlepage* was indicted before MR. JUSTICE NARES, present MR. BARON EYRE, for grand larceny; and the same indictment charged *Jane Warickshall* as an accessary after the fact, with having received the property, knowing it to have been stolen.

THE accessary had made a full confession of her guilt; and in consequence of it the property was found in her lodgings, concealed between the sackings of her bed. The confession, however, having been obtained by promises of favour, the Court refused to admit it in evidence against her; and it was contended by her Counsel, that as the fact of finding the stolen property in her custody had been obtained through the means of an *inadmissible confession*, the proof of that fact ought also to be rejected; for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction.

THE COURT. It is a mistaken notion, that the evidence of *confessions and facts* which have been obtained from prisoners by *promises or threats*, is to be rejected from *a regard to public faith:* no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the

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(*a*) Three men were tried and convicted for the murder of Mr. *Harrison*, of *Campden*, in *Gloucestershire*. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession therefore was not given in evidence against him, and a few years afterwards it appeared that Mr. *Harrison* was alive. *M.S.*

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against him. But this subject has more than once undergone the solemn consideration of THE TWELVE JUDGES; and a majority of them were clearly of opinion, That although confessions improperly obtained cannot be received in evidence, yet that any *acts* done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession (*a*).

(*a*) In February Session 1784, *Dorothy Mosey* was tried on the statute 10 & 11 Will. III. c. 23. for shop-lifting, and *a confession* had been made by her, and goods found in consequence of it, as in the above case. MR. JUSTICE BULLER, present MR. BARON PERRYN, who agreed, said, "Whatever *acts* are done, are evidence; but if those acts are not sufficient to make out the charge against the prisoner, the conversation or confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject-matter of proof. A prisoner was tried before me, (MR. JUSTICE BULLER) where the evidence was just as it is here. I stopped all the witnesses when they came to the confession. The prisoner was acquitted. There were two learned Judges on the bench, who told me, that although what the prisoner said was not evidence, yet that any *facts* arising afterwards must be received. This point, though it did not affect the prisoner at the bar, was stated to *all the Judges;* and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the acts done afterwards may be given in evidence, though they were done in consequence of the confession." See also *Lockhart's Case, postea, June Session*, 1785.—But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true. *Rex* v. *Butcher, Maidstone Summer Assizes*, 1798.—But it seems, says Mr. East, 2 C. L. 658, "that this opinion must be taken with some grains of allowance; for even in such case the most that is proper to be left with the Jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case: and this is now the more common practice.

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CASE CXXXII. THE KING *against* MARY AND BRIDGET MURPHEY.

The offence of *privately stealing from the person*, is confined to the hand that takes the property; for the 8 Eliz. c. 4. is silent as to aiders and abettors. S. C. 2 East, 701, and the cases there collected.

AT the Old Bailey in April Session 1783, *Mary Murphey* and *Bridget Murphey* were tried on the statute 8 Eliz. c. 4. for *privately stealing* a watch from the person of *James Mitchel.*

IT appeared that *Mitchel* and the two prisoners were drinking together in the tap-room of a public-house; that *Mitchel*, from the fatigue of the day's labour, laid his head on the table and fell fast asleep for about ten minutes; and that, when he waked, his watch, which he was sure he had when he fell asleep, was taken from his fob. The watch was almost immediately afterwards found upon the person of the prisoner *Bridget Murphey.*

MR. BARON EYRE. The circumstance of privacy which constitutes the capital part of this offence, seems to be personal, and confined to that agent alone who commits the fact. It depends almost generally upon a nice species of dexterity which does not require the assistance of a second person to perform, and therefore the legislature has not thought it necessary to involve those who are present when the offence is committed, in the severity of its punishment, however well inclined they may be to give effect to its completion; for the statute is quite silent as to aiders and abettors. The rule of law therefore upon this subject has uniformly been to confine the guilt of privately stealing to the individual hand that commits the fact; and wherever it is totally uncertain, as it seems to be in the present case, which of two prisoners actually took the property, it will follow that both of them must be acquitted of the capital part of the charge.

See 48 Geo. III. c. 129. by which 8 Eliz. c. 4. is repealed.

THE JURY, under this direction from the Court, found the prisoners guilty of stealing, but not privately from the person.

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THE KING *against* JACKSON AND RANDALL. CASE CXXXIII.

AT the Old Bailey in April Session 1783, *William Jackson* and *Thomas Randall* were indicted on the statute of 7 Geo. II. c. 21. before JAMES ADAIR, ESQ. Recorder; and the Jury found the prisoners *Guilty:* but a doubt arising whether the indictment had sufficiently described the offence, the judgment was respited, for the purpose of submitting the case to the consideration of THE JUDGES.

An indictment on the 7 Geo. II. c. 21. for assaulting with intent to rob, must state, that the assault was made with an *offensive weapon*, or that *a demand* was made of money or goods. S. C. 1 East, 419. See Rex *v.* Remnant, 5 Term Rep. 169.

THE 7 Geo. II. c. 21. enacts, "That if any person or persons shall, with any offensive weapon or instrument, unlawfully and maliciously assault, *or* shall by menaces, *or* in or by any forcible or violent manner, demand any money, goods or chattels, of or from any other person or persons, with a felonious intent to rob or commit robbery upon such person or persons, that then, and in every such case, all and every such person and persons so offending, being thereof lawfully convicted, shall be, and be adjudged guilty of felony; and every such offender and offenders shall be subject and liable to be transported as in cases of felony for seven years."

THE indictment stated, "That *William Jackson* late of the parish of *St. Martin's in the Fields*, in the county of *Middlesex*, labourer, and *Thomas Randall*, late of the same, labourer, on the third day of March, in the twenty-third year of the reign of our Sovereign Lord George the Third, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one *Andrew Gillespey*, in the peace of God and our said Lord the King then and there being, unlawfully, maliciously and feloniously did make an assault, and him the said *Andrew* then and there unlawfully and maliciously did menace, by then and there threatening and menacing to blow the said *Andrew Gillespey*'s brains out, with a felonious intent the monies of the said *Andrew Gillespey* from the person and against the will of him the said *Andrew Gillespey* then and there feloniously

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On the 3d of March 1783, the two prisoners and a man of the name of *Edward Chappel*, armed with an iron crow and a hammer, agreed to go together in the evening and break open a house near Charing Cross, but found it too well secured to effect their purpose with the instruments they were provided with, and which were the only weapons they had about them. On returning from this ineffectual attempt about one o'clock in the morning, they met Mr. *Gillespey* the prosecutor almost opposite the end of *Craig's Court*. The prisoners *Jackson* and *Randall* immediately stopped him, the one laying hold of his neck, and the other of his breast, one of them saying, twice in the same breath and in a low tone of voice, " *Not a word, or I will blow your brains out*," and the other immediately repeating the same words; but while one of the prisoners was putting his hand to the inside of his coat, as if to feel for a pistol or some other offensive weapon, Mr. *Gillespey*, before he could draw his hand back, seized *Jackson* with his right hand and *Randall* with his left, and called out *Watch! Watch!* on which *Chappel*, who had not interfered, immediately ran away. The two prisoners also endeavoured to escape without attempting any further violence against the person of Mr. *Gillespey*, and actually disengaged themselves from his grasp; but the watchmen at that instant coming up, a pursuit took place, and they were all three taken into custody. The iron crow was found on the person of *Randall*, and *Chappel*, (who was admitted a witness for the Crown,) had the hammer; but *Jackson* was without any weapon, nor was any offensive weapon produced or any menace used, or demand of money made except as above described.

The prisoners' Counsel objected, that supposing the indictment to have been properly drawn, this evidence was not sufficient to support the charge, inasmuch as it did not appear that any *demand* either of money or goods had been made.

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BUT THE COURT said that an *actual demand* was not necessary, and that this was a fact for the consideration of the Jury under all the circumstances of the case; and

THE Jury found the prisoners *Guilty*.

IT was then moved in arrest of judgment, that the indictment did not describe the offence properly according to the words of the statute. The statute creates two distinct species of this offence of an intent to commit robbery, *viz.* 1st, when that intent is manifested by a malicious assault with an offensive weapon or instrument, and 2dly, where it is manifested by a demand of money or goods made either by menaces or in any forcible or violent manner. The present offence is within the second branch of the Act; for here no offensive weapon of any kind was produced. The indictment therefore should have stated the charge in the terms of the statute.

THE judgment was respited, and the case submitted to the consideration of the JUDGES, Whether an indictment under this statute, in describing the manner in which the offence was committed, must not necessarily state, either that the assault was made with *an offensive weapon*, with a felonious intent to rob, &c. OR, that by *menaces*, or in or by a forcible or violent manner, *a demand* of monies or goods was made with a felonious intent, &c. the words of the Act being throughout in the disjunctive.

IN the July Session following, the prisoners were put to the bar, and informed by MR. RECORDER, that THE COURT had taken the case into their consideration; and that it was the opinion of the JUDGES, That the indictment was insufficient, in not having stated that the assault was made with an offensive weapon, OR, that any demand was made of money or goods; and that therefore no judgment could be given on it; for that it is necessary in point of law, that an indictment on any particular Act of Parliament should strictly follow the words of the Act; and that the COURT cannot supply from any other circumstances a sufficient description of the offence.

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CASE CXXXIV. THE KING *against* RICHARD HORNER.

To obtain property by fraud, and under a preconcerted plan to rob, is felony; but the *animus furandi* must be found by the Jury.

RICHARD HORNER and two other persons were committed to *Exeter gaol* on a warrant which charged them with "defrauding and robbing *J. Cunnet*, under divers false pre-"tences, of nineteen guineas and a ten pound bank-note."

The Court of King's Bench in admitting to bail will look into the depositions, and guide their discretion by the circumstances of the case.

IN Easter Term 23 Geo. III. the prisoners were brought up by *Habeas Corpus* to the King's Bench, in order to be admitted to bail, on the ground that the charge amounted to *a misdemeanor* only.

THIS application was opposed, and the depositions taken before the committing magistrate read, by which it appeared, that the prisoners had decoyed the prosecutor into a public-house, and had there obtained the money of him for the purpose of playing at cards. The prosecutor swore, that he did not play on his own account, but that the prisoner prevailed upon him to cut the cards for one of them, and then, under pretence that he had cut them for himself, and had lost the money, another of them swept it off the table, and went away with it.

THE COURT. In cases of this kind the course has always been, to leave it to the Jury to determine *quo animo* the money was obtained; and, if they find that it was obtained upon a preconcerted plan to rob the prosecutor, it will be felony. In the case of *Rex* v. *Patch* at the Old Bailey (1), a man was prosecuted for *felony*, for obtaining money by dropping a ring wrapped up in a bill or receipt, purporting that the ring had cost fourscore pounds, when in fact it was worth little or nothing. The Court in such a case never form any judgment whether the facts amount to felony or not, but merely whether enough is charged to justify a detainer of the prisoner, and put him upon his trial.—The practice of this Court is, and upon reference to the Officers of the Crown Office we find it to have been long established, that even where the commitment is regular, the Court will look into the depositions to see if there be a sufficient ground laid to

(1) February Session 1782. *ante.*

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detain the party in custody; and if there be not, they will bail him. So also, where the commitment is irregular, if it appear that a serious offence has been committed, they will not discharge or bail the prisoner without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody.

THE prisoner was remanded.

THE KING *against* JOHN DAVIS.

CASE CXXXV.

Where a statute makes an offence felony, punishable with death without clergy, and a subsequent statute inflicts a milder punishment on the same offence, the latter statute is a *virtual* repeal of so much of the former statute as relates to the offence.

AT Hertford Summer Assize 1783, *John Davis* was indicted on the BLACK ACT, before MR. JUSTICE GOULD, for "that "he one fallow deer, of the price of forty shillings, of and "belonging to *Philadelphia Lee*, widow, then and there being "kept and fed in a certain park, of and belonging to the "said *Philadelphia Lee*, inclosed with pales, where deer had "been and then were usually kept, unlawfully, wilfully, and "feloniously did hunt," &c.

THERE were two other counts; one for *killing*, and the other for *stealing* the fallow deer as aforesaid.

THE statute of 9 Geo. I. c. 22. upon which the indictment was founded, enacts, "That if any person or persons, being "armed with swords, fire-arms, or other offensive weapons, "and having his or their faces blacked, or being otherwise "disguised, shall appear in any forest, chase, park, paddock, "or grounds inclosed with any wall, pale, or other fence, "wherein any *deer* have been or shall be usually kept, or in "any warren or place where *hares* or *conies* have been or shall "be usually kept—OR SHALL unlawfully and wilfully hunt, "wound, kill, destroy, or steal any red or *fallow deer*, or "unlawfully rob any warren or place where *conies* or *hares* "are usually kept—OR IF any person or persons shall un- "lawfully and wilfully hunt, wound, kill, destroy, or steal "any red or *fallow deer*, fed or kept in any places, in any "of his Majesty's forests or chases, which are or shall be "inclosed with pales, rails, or other fences; or in any park,

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" paddock, or ground inclosed, where deer have been or " shall be usually kept—OR SHALL forcibly rescue any per- " son, being lawfully in custody of any officer or other per- " son for any of the offences before-mentioned—OR IF any " person or persons shall by gift or promise of money, or " other reward, procure any of his Majesty's subjects to join " him or them in any such unlawful act; every person so " offending, being thereof convicted, shall be adjudged guilty " of felony, and shall suffer death as in cases of felony with- " out benefit of clergy."

BUT the learned Judge recollecting that an Act of Parliament had recently passed which reduced the offence charged in the indictment to a *misdemeanor*, he thought it improper to proceed to try the prisoner on the present charge for felony, until he had submitted to the JUDGES the following question:

WHETHER the statute 9 Geo. I. c. 22. so far as it respects the offences charged in the indictment, unaccompanied by the circumstance of being *armed and disguised*, is not virtually repealed by the statute of 16 Geo. III. c. 30.?

See 42 Geo. III. c. 107.

THE statute of 16 Geo. III. c. 30. recites, that the statutes in force for the discovery and punishment of deer-stealers are numerous, and many of them ineffectual; and that the good purposes thereby intended might be better effected, if such of the said statutes as are found defective were *repealed*, and the good provisions therein contained, together with such other provisions as may be expedient, were reduced into *one act*: and then it enacts, " That if any person or " persons shall course or hunt, or shall take in any slip, " noose, toil or snare, or shall kill, wound, or destroy, or " shall shoot at, or otherwise attempt to kill, wound or de- " stroy, or shall carry away any red or *fallow deer*, in any " forest, chase, purlieu, or ancient walk, whether inclosed " or not, OR in any inclosed park, paddock, wood, or other " inclosed ground, where deer are, have been, or shall be " usually kept, without the consent of the owner, or without " being otherwise duly authorized; or shall be aiding, abett-

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"ing or assisting therein or thereunto; EVERY PERSON so "offending by coursing, hunting, shooting at, or otherwise "*attempting* to kill, wound, or destroy, or by aiding therein "or thereunto, shall forfeit for every such offence the sum "of *twenty pounds*.—AND every person so offending by kill- "ing, wounding, or destroying, or by taking in any slip, "noose, toil, or snare, or by carrying away, or by aiding "therein respectively, shall for every deer so wounded, killed, "destroyed, taken, or carried away, forfeit and pay the sum "of *thirty pounds*.—AND IF the offender in any of the cases "aforesaid shall be a keeper of, or person in any manner "intrusted with the custody or care of deer, in the forest, "chase, purlieu, ancient walk, or inclosed park, paddock, "or wood, or other inclosed place where the offence shall "be committed, every such offender shall forfeit and pay "*double the penalty* herein before appointed to be paid by "other offenders.—AND IF any person or persons, after "having been convicted of any of the aforesaid offences, "shall offend a second time against this Act, by committing "any of the aforesaid offences; such second offence, whether "it be the same as the first offence, or be any other of the "aforesaid offences, shall be deemed and adjudged to be "*felony*; and the person guilty thereof, being lawfully con- "victed upon indictment, shall be transported for the space "of seven years." The Act then goes on to shew the manner in which Justices of the Peace may proceed on conviction of offenders, and concludes with repealing such parts of the several statutes named in the margin (1) as relate to deer; but it is totally silent as to the intervening statute of 9 Geo. I. c. 22. upon which the present indictment was founded.

(1) 13 Rich. II. c. 13. 19 Hen. VII. c. 17. 5 Eliz. c. 21. 3 Jac. I. c. 13. 7 Jac. I. c. 11. 13 Car. II. c. 3. & 4 Will. & Mary, c. 23. 5 Geo. I. c. 23. 10 Geo. II. c. 32.

ON the first day of Michaelmas Term 1783, the TWELVE JUDGES held a conference upon this subject at LORD MANSFIELD'S chambers in Serjeants' Inn; and they were unanimously of opinion, That the statute of 16 Geo. III. c. 30. amounted to a repeal of the felony of simply killing deer in a park inclosed; as it punishes the first offence with a pecu-

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niary forfeiture of *twenty pounds*, and makes the second offence felony (*a*).

(*a*) The statute of 5 Geo. I. c. 27. inflicts a fine not exceeding 100*l.* and three months imprisonment on such persons as shall be convicted of seducing artificers.—The 23 Geo. II. c. 13. inflicts a penalty of 500 *l.* and twelve months' imprisonment on the same offence; and LORD MANSFIELD held, that the latter statute was in this respect a virtual repeal of the former. *Rex* v. *Cator*, 4 *Burr.* 2026.—But see the Case of *Rex* v. *Brady* at the Old Bailey September Session 1797, where it is said by MR. JUSTICE HEATH, that the prior statute was in these cases held to be repealed, because the latter statute was passed at a *subsequent session*; and that when both statutes pass at *the same session*, the latter is only explanatory of the former.—See also the Case of *Rex* v. *Michael Robinson*, *post*. February Session 1796, and Rex *v.* Howe, Old Bailey January Session 1788, *post*. and consonant to the above determination it was held by all the JUDGES in the Case of Thomas Heath Sarum, March 1801, that no indictment lies for deer stealing in the first instance, although it be laid that the deer was reclaimed, 2 East C. L. 609. But by the statute 42 Geo. III. c. 107. the stealing, destroying, &c. of any red or fallow deer in any inclosed ground wherein deer have been usually kept, is again made felony and transportation for seven years.

CASE CXXXVI.

THE KING *against* ECCLES.

An indictment for a conspiracy to impoverish a man by preventing him from working at his trade, need not state the overt acts used to effect the intended mischief.

THE defendant and six other persons were convicted at the Summer Assizes for *Lancaster* in the year 1783, on an indictment, containing two counts, for conspiring to impoverish one *H. Booth* a taylor, and to prevent him, by indirect means, from carrying on his trade. The indictment had been found at the Quarter Session for the town of *Lancaster*, and removed by certiorari into the King's Bench.

THE FIRST COUNT stated, "that the defendant together "with divers other persons to the Jurors unknown, being "persons of ill name and fame, and of dishonest conversa- "tion, and wickedly devising and intending unjustly, un- "lawfully and by *indirect means* to impoverish one *H. Booth*, "and to deprive and hinder him from using and exercising "the trade and business of a taylor, which he used and ex-

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"ercised, on the 28th day of November in the 23d year, "&c. at *Liverpool*, within the jurisdiction of the court of "Quarter Sessions there, fraudulently, maliciously and unlawfully did confederate, conspire, combine, and agree "among themselves, by wrongful, and *indirect means* to impoverish the said *H. Booth*, and to deprive and hinder him "from following and exercising his aforesaid business of a "taylor in *Liverpool* aforesaid, and within the jurisdiction "aforesaid; and that the said defendants, together with the "said other persons to the Jurors unknown, in pursuance of "and according to the unlawful conspiracy, combination, "and agreement aforesaid, on the said 28th day of November, "at *Liverpool* aforesaid, and within the jurisdiction aforesaid, indirectly, unlawfully, maliciously, and unjustly did "prevent and hinder the said *H. Booth* from following his "said trade or business at *Liverpool* aforesaid, and within "the jurisdiction aforesaid; and thereby did, then and there, "greatly impoverish the said *H. Booth*; to the great damage of the said *H. Booth*; to the evil example, &c. and "against the peace, &c." The SECOND COUNT stated "that "the said defendants, together with divers other persons to "the Jurors unknown, on the said 28th day of November "in the 23d year aforesaid, at *Liverpool* aforesaid, and "within the jurisdiction aforesaid, wickedly, wrongfully, "unlawfully, and maliciously, did confederate together, and "conspire and agree by indirect means to prejudice and impoverish the said *H. Booth*, and to prevent and hinder "him the said *H. Booth* from using and exercising his aforesaid trade or business of a taylor in *Liverpool* aforesaid, "and within the jurisdiction aforesaid, to the great damage, "&c. in contempt, &c. to the evil, &c.; and against the "peace, &c."

See the Case of Taylor and Towlin, Godb. 444. Rex *v.* Turner, 13 East's Term Rep. 230.

IN the Michaelmas Term following, the defendants were brought up to receive the judgment of the Court; but

CHAMBRE and TOPPING moved that it might be arrested.

FIRST. The indictment only contains *a general charge* of conspiracy. It ought to have stated the acts that were com-

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mitted to impoverish *Booth*, and prevent him from carrying on his trade, in order that the defendants might thereby have had notice of the *particular charges*, they were called upon to answer, and that the Court might see that the alleged conspiracy really existed. In the Case of *Rex* v. *How* (1), it was determined that an indictment for obstructing a magistrate in the execution of his office, without setting out some act or other, is bad: so in *Rex* v. *Munoz* (2), an indictment for procuring a promissory note by false tokens, under pretence of giving the prosecutor the money for it, is held bad for not specifying what the false tokens were (3). The offence of *Barratry* is the only exception to this rule requiring particular acts to be set out, and there it is only from the necessity of the thing, because of the multiplicity of acts of which that offence consists, and because the words *communis barractator* is a term of art, appropriated by the law to this purpose (4), and even in this case it is said to be a settled practice, not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him (5).

(1) 2 Stra. 699.

(2) 2 Stra. 1127.

(3) See 2 East's Pleas of the Crown, Chap. 18.

(4) Hawk. P. C. Bk. 1. ch. 81. s. 9.

(5) Ibid. s. 13.

SECONDLY, that the issue was misjoined, for it is "that "the said *Eccles* and others," and only *four* out of the *seven* defendants appeared; but this record, in its present form, has the effect of a conviction against them all.

LORD MANSFIELD (without hearing the other side). The conspiracy, and the object of it are both stated in the indictment, but it is contended that *the means* by which the intended mischief was effected, ought also to have been particularly set forth as in the Case of *Rex* v. *Sterling and others* (6), but this is certainly not necessary, for the offence does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the *git* of the offence (7), persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he

(6) 1 Lev. 125.

(7) See Rex v. Rispal, 3 Burr. Rep. 1321. S. C. 1 Bl. Rep. 368.

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pleases, but a combination not to work under certain prices is an indictable offence.—As to the second objection, the defendants all appeared; for upon this record it is added "and "they and each of them severally say, &c."

WILLES, Justice. All the cases upon this subject were fully considered in the Case of *Rex* v. *Kinnersley* (1), in which it was decided, that in an indictment for a conspiracy it is not necessary to state the means by which the mischief was effected (2).

(1) 1 Stra. 198.

(2) See Rex v. Armstrong and others. 1 Vent. 304.

BULLER, Justice. The indictment states, "that the defendants intending unlawfully and by *indirect means* to impoverish the prosecutor, unlawfully did conspire, &c.; but nothing need to have been stated about the means, for the means are matter of evidence to prove the charge (3), and not the crime itself. The indictment therefore rather states too much than too little. As to the second objection, if in fact the defendants did not all appear, it is a blameable negligence in the clerks of the office, in making this careless entry, and the remedy must be against them.

(3) It seems that the fact of conspiring need not be positively proved, but may be collected from collateral circumstances. Rex v. Parsons, 1 Bl. Rep. 392.

THE defendants received judgment of six months' imprisonment in the gaol of *Liverpool* (*a*).

(*a*) An indictment for conspiring to indict another of a *Capital Crime*, and that in pursuance of such conspiracy they did afterwards indict him, is good although it do not charge it to be a conspiracy to indict *falsely*. Rex *v.* Spragge and others, 2 Burr. Rep. 993. But an indictment will not lie for conspiring to commit *a civil trespass*. Rex *v.* Turner and others, 13 East's Term Reports, 228. in which case LORD ELLENBOROUGH C. J. said, that the Case of *Rex* v. *Eccles*, was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act *affecting the public*.—But where two conspire and one dies, the other may still be indicted for the conspiracy, Rex *v.* Nichols, Mich. 17 Geo. II. cited 13 East's Term Rep. 412—414

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CASE CXXXVII.

THE KING *against* DANIEL HICKMAN.

If a man obtain property from another by accusing him of having been guilty of an unnatural crime, it will amount to ROBBERY, although the party was under no apprehension of personal danger, and felt no other fear than that of losing his character.

S. C. 2 East, 728.

THE prisoner was tried before MR. JUSTICE BULLER at the Old Bailey in July Session 1783, for robbing *John Miller* of two guineas.

The prosecutor was servant to Mr. *Lewis*, table-decker to the Chaplain's room in Saint James's Palace, and had an apartment there, in which he alone slept; which apartment was situated in a court called "The Board of Green Cloth." The prisoner was *a sentinel* on guard at the palace, and had been one night treated by the prosecutor with some bread and cheese and ale in his room. About a fortnight afterwards, very late in the evening of the day laid in the indictment, the prosecutor, on going up stairs, heard somebody stepping very closely behind him. On turning round he discovered that it was the prisoner, who said, "It is me." The prosecutor replied, "What brought you here at this time of the "night?" The prisoner answered, "I am come for satis-"faction; you know what passed the other night; you are "a *Sodomite*; and if you do not give me satisfaction, I will "go and fetch a serjeant and a file of men, and take you "before a Justice; for I have been in the Black-Hole ever "since I was here last, and I do not value my life." The prosecutor asked him what money he must have? The prisoner said, "I must have three or four guineas." The prosecutor accordingly gave him two guineas, which was all he had, and promised to give him another guinea the next morning. The prisoner took the two guineas, saying, "Mind, "I don't *demand* any thing of you." The next morning he came again, and received the other guinea; and in a few days after, upon making an application for more money upon the same pretence, he was apprehended. The prosecutor swore, that he was very much alarmed when he gave him the two guineas (*a*), and did not very well know what he did;

See Jackson and Shipley's Case.
1 East's P. C. add: XXI.

(*a*) But where in a case of the like kind, the prosecutor swore that at the beginning of the business, he apprehended injury to his person or character, but that at the time when the prisoner took the money he had no

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but that he parted with his money under an idea of preserving his character from reproach, and not from the fear of personal violence.

THE learned Judge stated to the Jury the several ingredients which the law required to constitute the crime of robbery; and particularly, as applicable to this species of it, the determination of the JUDGES in the Case of *the King* v. *Donnally* (1); remarking the difference, that in *Donnally's Case* the prosecutor had sworn, that *he delivered his money under an apprehension of personal danger*, as well as from the fear of losing his character; but that, in the present case, the prosecutor had sworn, that he parted with his money *for the sake of his character only, and not from any apprehension of danger to his person.*

(1) Ante, page 193, Case 97.

THE Jury found the prisoner *Guilty*, and also that the prosecutor parted with his money against his will, through a fear that his character might receive an injury from the prisoner's accusation.

THIS case however, being only the second of the kind, and some doubt having prevailed with respect to *Donnally's Case*, because he was not executed, and because this case differed from it, as above described, the judgment was respited, and the case submitted to the consideration of the TWELVE JUDGES, upon the difference before mentioned between the two cases.

IN February Session 1784, the prisoner was called to the bar, and MR. JUSTICE ASHHURST delivered the opinion of the JUDGES to the following effect:—Some doubts having been entertained as to the opinion of the TWELVE JUDGES in the case of *Patrick Donnally*, the learned Judge who tried the prisoner thought it proper that the present case should

such apprehension, but parted with the money for the purpose of bringing the offender to justice, and with that view only: and that although he did not part with it voluntarily nor should have parted with it unless for the several applications which had been made to him by the prisoner, yet that when he did part with it, he was under no fear or apprehension, the JUDGES held it was not robbery; there being neither actual nor constructive violence. Reane's Case, Old Bailey June 1794, *post.*

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likewise be referred to their consideration. They have accordingly conferred upon it; and they are of opinion, That it does not *materially* differ from the case of *Donnally*, for that the true definition of ROBBERY is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of *force* or *terror*, as to induce the party *unwillingly* to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the JUDGES are unanimously of opinion, That upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes, is, as in the present case, a sufficient *force* to constitute the crime of robbery by putting in fear.

THE prisoner received sentence of death, and was ordered for execution; but *he was reprieved*, and at the end of April Session 1784, received his Majesty's pardon on condition of being transported to Africa for fourteen years.

CASE CXXXVIII.

THE KING *against* SAMUEL GASCOIGNE.

If a bailiff handcuff a prisoner under pretence of carrying him to prison with greater safety, and by means of this violence extort money, he is guilty of ROBBERY.—44 Edw. III. pl. 14. 4 Hen. IV. pl. 3. Staunf. 27. Kely, 43. 1 Sid. 254. 1 Hale, 507. S. C. 2 East, 709.

AT the Old Bailey in October Session 1783, *Samuel Gascoigne* was tried before MR. JUSTICE NARES, for that he on the 11th October 1783, in the King's highway, in and upon one *Jane Woodward*, the wife of *Charles Woodward*, feloniously did make an assault; and her the said *Jane* in bodily fear and danger of her life, in the highway aforesaid, then and there feloniously did put; and *four shillings* of the goods, chattels, and monies of the said *Charles Woodward*, from the person and against the will of the said *Jane*, in the highway aforesaid, then and there feloniously and violently did steal, take, and carry away, &c.

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THE following facts appeared in evidence.—*Charles Woodward*, the husband of the prosecutrix, was a clock-maker in *New Gravel-lane* in *Wapping*. The prisoner had not long before this transaction kept a green-stall in Fleet-market, but was at this time an under-servant to the turnkey of *the New Prison* in *Clerkenwell*, and acted occasionally as a runner to the Rotation Office in *Shadwell*, but had no regular appointment either as a constable or other peace-officer. A short time previous to the day laid in the indictment a quarrel had taken place between the prosecutrix and a woman who lodged in her house, and the woman obtained a warrant from the Magistrates of that district to apprehend her for an assault: this warrant was put into the hands of the regular constable of the parish to execute, and he accordingly took Mrs. *Woodward* into custody, and, on discovering the flimsy nature of the charge, permitted her to return home on her husband undertaking to procure bail for her the same evening, or at furthest on the ensuing day. On his neglecting however so to do, the woman, at the instigation it was said of the runners at the Shadwell Office, procured another warrant against her, which was given to a headborough at *Shadwell* to execute. The headborough accordingly, about twelve o'clock at noon on the 11th October 1783, went to Mrs. *Woodward*'s house, while her husband was from home, and informed her of the object of his errand. She intreated that she might not be taken from her two infant and helpless children until her husband came home, whom she offered to send for from the place in the neighbourhood where he was then at work, but the officer immediately hurried her away, crying and terrified, through the streets to the public office at Shadwell, where, on finding that the Justice was gone from *Shadwell* to *East Smithfield*, he delivered her into the custody of the prisoner, who immediately called a coach and carried her to the *East Smithfield Office*, where in about an hour afterwards the Justice, who was then sitting, examined the complaint, and ordered her to find bail, but at the same time advised the parties to make the matter up and become good friends. Soon after this hearing the Justice left the

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office, and the parties not being able to settle the dispute, the prisoner carried Mrs. *Woodward* to the sign of the King's Arms, an adjacent public-house, to which those who had business at the Rotation Office generally resorted, and which was used as a lock-up-house for such delinquents as the runners occasionally had in their custody. In this house Mrs. *Woodward's* husband was then sitting in expectation of his wife being discharged, and on finding that the matter was unsettled, and she was still in custody, he begged the prisoner would wait a short time while he went to procure a friend to bail her, and immediately left the house. The prisoner however, the moment her husband was gone, began to treat her very ill, locked her up in a nasty stinking place among common felons, as she described them; and after permitting her to remain some time, brought her out and threatened to carry her immediately to prison. Terrified by this threat she fell on her knees and implored him, with tears in her eyes, only to wait until her husband returned; and taking a shilling from her pocket into her hand offered to give him that, or even half-a-crown, if he would comply with her request; but he, regardless of her cries, told her in the insulting cant of such characters that he would marry her to her fellow-prisoner, and immediately handcuffed her to a man whom he had in his custody on a charge of assault; and who, as the prisoner alleged, had before rescued himself. A coach, either that which had conveyed her from the *Shadwell Office*, or another which had been sent for on purpose, was at this time standing at the door of the public-house, and while the poor woman was lamenting the condition of her children and endeavouring by every means in her power to excite the prisoner's pity, he kicked her, thus handcuffed, before him, just as if she had been a dog, and shoved her and her companion both into the coach, which he ordered to drive to the New Prison in Clerkenwell. Scarcely, however, had the coach departed from the door, before the prisoner put a handkerchief to her mouth and forcibly took from her the shilling which she still held in her hand, saying, at the same time, "*This will*

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"*buy us a glass a-piece.*" He then asked her, whether she had any more money in her pocket? saying, that he was sorry for her children, and that if she had as much as would pay the coach she should not go to prison, for that though he must go there with the other man, he would bring her back; but while she was exclaiming that she had no more money, the man that was handcuffed to her rattled the handcuff against the side of her pocket, while the prisoner put his hand into her pocket and took out three shillings, which was all she had, except one shilling that had got so far into the pocket lining that she afterwards found a difficulty in getting it out. The prisoner continued to promise that he would bring her back, and in about ten minutes after this transaction he ordered the coach to stop at a public-house in *Long-lane* near *Smithfield*, where he called for some gin, of which, by repeating his promise that she should not be detained, he induced her to drink a glass, and which he paid for with one of the shillings he had taken from her, keeping the change himself. They arrived at *the New Prison* about four o'clock in the afternoon, where, after taking the deluded woman into one of the back apartments, he left her in full expectation that he would return and restore her to her children and her home. On finding that he did not return she innocently applied to the keeper, and, telling him that she was not a prisoner, desired he would shew her the way out of the prison; but he immediately undeceived her, and told her she was his prisoner. She then related the circumstances to those about her, and continued in this custody from this time until eight o'clock the same evening, when her husband arrived with an order from the Justice for her discharge. She admitted, on giving her evidence, that after the prisoner had taken the three shillings out of her pocket, she told him that she would be contented that he should keep them if he would take her back; that he had promised he would do so; and that it was the hope of his performing this promise, that had prevented her from making any complaint at the public-house in *Long-lane* of the usage she had received; but she positively swore, that he had taken

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the shilling from her hand, and the three shillings from her pocket, violently without her consent, and against her will.

THE COURT told the Jury, That the question under all the circumstances of the case was, whether this handcuffing and carrying away in the coach, against the power and without the consent of the prosecutrix, and when she intreated not to be taken away, were means used by the prisoner to get her into his power and under his controul, with a felonious intent to take away her money; that to constitute a felony of any kind, the mind must be guilty; and that they must therefore draw their conclusion of the guilt or innocence of the prisoner from the intention which existed in his mind at the time he took the money; that to commit the crime of robbery, it was not necessary that the violence used to obtain the property should be by the common and usual modes, of putting a pistol to the head or a dagger to the breast, for that a violence, though used under a colourable and specious pretence of law or of doing justice was sufficient if the real intention was to rob; that if a man go to a house under pretence of having a search-warrant, or of being authorized to make a distress, and by these means obtain admittance, it is, if done in the night time, a sufficient breaking and entering to constitute burglary, or, if done in the day time, house-breaking; so, also, to obtain money by means of a threat to accuse another of having committed an unnatural crime, is held to be obtaining money by such a degree of terror as will constitute the crime of robbery (*a*); that in the present case the prosecutrix's assent, given after the money was taken, that the prisoner should keep it if he would take her back with him, would not alter the nature of the offence, provided the original taking was a felonious taking against her will and consent. And the learned Judge left it with the Jury to consider, whether the prisoner took the money from the prosecutrix with a felonious intent,

Fost. 128. 1 Hale, 533.

(*a*) See Blackham's Case. Taplin's Case. Simon's Case. Spencer's Case. Jones's Case, and Donnally's Case, 2 East P. C. 711 to 717.

putting her in a state of incapacity to make any defence at the time when he took her property. 1783.

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THE Jury found that the prisoner, when he forced the prosecutrix into the coach, had a felonious intent of getting whatever money she might chance to have in her pocket; that he had made use of the violence with the handkerchief as a means of preventing her resistance; and that putting her into a state in which she was not capable of defending herself, by handcuffing her to another prisoner, under a pretence of carrying them more safely to prison, was only a colourable mean of putting his felonious intention into execution.

THIS case was referred to the consideration of the JUDGES; and in February Session 1784, MR. JUSTICE ASHHURST delivered it as their unanimous opinion, That as it was found by the verdict, that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence he had committed was clearly a robbery.

THE KING *against* SAMUEL WILSON.

CASE CXXXIX.

AT the Old Bailey in October Session 1783, *Samuel Wilson* was tried before MR. BARON EYRE, for that he on the 20th September preceding, one piece of false, feigned, and counterfeit money and coin to the likeness and similitude to the good, legal, and current coin of this realm called A SHILLING, falsely and deceitfully, feloniously and traitorously, did forge, counterfeit, and coin, against the duty of his allegiance, and against the statute in such case made and provided.

To make a round blank like the smooth shillings in circulation, the original impression on which has been effaced by wear, is counterfeiting to the likeness and similitude of the good, legal, and current coin of the realm called a shilling.

THE prisoner had taken a house in *Tennis-court*, in the *Middle-row*, in *Holborn*, and hired a man of the name of *Joseph Rowe*, a journeyman brass-founder, at so much a week, for the express purpose of coining shillings. The police officers having received information of this proceeding, went to the house, and not finding either *Wilson* or his man

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WILSON'S CASE.

at home, opened the door with a key they had previously furnished themselves with for that purpose; and on going in discovered in different parts of the premises, white roll metal, cecil, a cutting press, a rounding engine, emery paper, cork, and a variety of other materials used by coiners, together with several shillings in an imperfect state, and fifty-four shillings completely finished; but there was no press, die, stamp-mould, or other instrument by which the likeness and similitude of the usual figures on *the head* or *the tail* side of a Tower-coined shilling could be made; and the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation except their colours, size, and shape: But the master of the Mint proved that they were bad, that is, not Tower-coined shillings; adding, that they were very like those shillings the impression on which had been worn away by time, and that therefore persons who had less skill than himself in detecting their being bad, would very probably take them as and for good and legally coined shillings.

THE prisoner's Counsel objected that the evidence did not prove the indictment, for that these shillings could not be said to have been counterfeited to the likeness and similitude of the good and legal coin of the realm; the smooth shillings, to the likeness and similitude of which the present shillings were made, not being of themselves, though current, any way resembling the real coin of the realm.

BUT THE COURT were of opinion, that a blank that is smoothed and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within this statute; these blanks having some reasonable likeness to that coin which has been defaced by time and yet passes in circulation (*a*).

(*a*) See Rex v. John and Patrick Welsh, Hertford Lent Assizes, *post.* Varley's Case, York Lent Assize 1771, *ante* page 76, Case 42. The Case of Harris and Minion, Serjeant's Inn, 1776, *ante*, page 135, Case 78.

THE prisoner was found *Guilty*, and received sentence of Death.

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THE KING *against* MACAULEY. CASE CXL.

AT the Old Bailey December Session 1783, *James Macauley* was tried before MR. BARON HOTHAM, present MR. SERJEANT ADAIR, Recorder, for robbing *Edward Thompson*, a boy of ten years of age, of a bundle containing articles of wearing apparel. What force is necessary to constitute robbery.

THE boy, about half past eight o'clock on the evening of the 17th December 1783, was carrying the bundle along Raven Street, Spitalfields, in his hand, when the prisoner ran past him and snatched it suddenly away; but on the boy crying out, Stop thief, he threw down the bundle, and was apprehended immediately afterwards by a Jew, and taken to the watch-house.

THE COURT. The evidence in this case does not amount to a robbery; for although the prisoner snatched this bundle from the boy, it was not with that degree of force and terror that is necessary to constitute this offence.

THE Jury accordingly acquitted him of the robbery and found him guilty of the larceny only (*a*).

(*a*) See 2 East's P. C. 702, 703, where all the cases upon this point are collected; and the note to the Case, Rex *v.* Baker, *post.* page 291, Case 142.

THE KING *against* GODFREY. CASE CXLI.

OLD BAILEY December Session 1783. This was an indictment on the statute 10 & 11 Will. III. cap. 23. for stealing a piece of woollen cloth, the property of *Edward Shepherd*, privately in his warehouse. *Q.* Whether the warehouse of a Blackwell-Hall Factor is within the meaning of 10 & 11 Will. III. c. 23. S. C. 2 East, 642. Foster, 78.?

THE prosecutor was a Blackwell-Hall Factor, who received

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GODFREY'S CASE. See Barrington on the Statutes, p. 487. and Mr. Dodson's Preface to Foster's Reports, XVI & XVII.

his goods by bales or packages from the manufacturing clothiers in the country, each piece of which was separately tied up in brown paper, and marked by numbers on the outside. On receiving them into his warehouse, they were sometimes taken out of the bales immediately, but never out of the papers, and done up on shelves. Sometimes they continued in the bales till a customer called for such articles as the papers contained. But no goods were ever exposed to sale, by hanging them in the warehouse windows, or at the door; nor was the bulk of the pieces ever broke, or sold by retail. They were sold entirely on commission, sometimes for home consumption, and sometimes for exportation. The door of the warehouse sometimes stood open; but in general it was kept shut, and fastened by a latch, but not so as to prevent its being opened at pleasure on either side.

THE COURT doubted whether this could be considered such a *warehouse* as is within the intent and meaning of the statute on which the indictment was founded. The doubt arose upon the report of *Howard's Case* (1) at the Old Bailey in the year 1751; in which the Court were of opinion, that the word *warehouses*, in the statute, did not mean mere *repositories* for goods, but such places where traders keep their goods for sale, *in the nature of shops*. The preamble of the statute also recites, that the crime of stealing goods privately out of *shops* and *warehouses*, commonly called *shop-lifting*, was of late years much increased, &c.

(1) Foster, 78.

UPON this doubt, and also because there was no proof of the prisoner's having been seen *in the warehouse*, he was acquitted of the capital part of the charge.

CASE CXLII.

THE KING *against* SMITH.

An accessary may controvert the guilt of the principal, notwithstanding the record of his conviction.

OLD BAILEY December Session 1783. The prisoner was indicted on the statutes 3 & 4 Will. and Mary, c. 9. s. 4. and 5 Anne, c. 31. s. 5. as an accessary after the fact, in receiving a quantity of flour, the property of *John Peacock*, knowing it to have been stolen.

1783.

SMITH'S CASE.

IT appeared that two persons, of the names of *Gilbertson* and *Wareham*, who were servants to the prosecutor at the time the felony was committed, had made a full and free confession of the fact of stealing the flour from their master, and that *Wareham* had been convicted as a principal in the felony, on the evidence of *Gilbertson*, who had been admitted a witness for the Crown, and bound over to prosecute *Wareham* as a principal and *Smith* as an accessary in the felony, and on an indictment against *Wareham*, he had been convicted as a principal in the county of *Surrey*, the record of which conviction was now produced (*a*).

THE COURT thought that this mode of defence was only applicable to cases where the principal and accessary are tried together upon the same indictment, because in such case by shewing the principal to be innocent, it acquits the accessary of guilt, for they are *participes in lite;* but that where a record of the conviction of the principal intervened, it altered the case, and precluded any evidence being given against the record; but on inspecting the opinions expressed by SIR MICHAEL FOSTER (*b*), upon this subject in the Case of *M'Daniel and others*, the COURT permitted the prisoner's Counsel to controvert the propriety of *Wareham*'s conviction by *vivâ voce* testimony, remarking, that it was an exception to the general rule, a record of conviction being only conclusive against the party to it; and it in fact appeared, on the cross examination of the prosecutor himself, that he had intrusted both *Wareham* and *Gilbertson* with the flour in such a way as to make the conversion of it a *breach of trust* only, and not a *felony*.

THE prisoner's Counsel therefore submitted, that as the prosecutor had intrusted his servants with his property in such a way as to part with the possession of it, the prisoner could not be guilty of felony.

(*a*) See 2 Hawk. c. 46. s. 20. and Rex *v.* Castell Carcinion, 8 East's Term Rep. 77, where it is said, that the books are uniform in requiring the production of THE RECORD to prove a witness convicted of an offence.

(*b*) Foster's Crown Law 121 and Discourse III. ch. 11. sect. 3.

1783. THE prisoner was accordingly acquitted (*a*).

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(*a*) In February Session 1784, *Philip Prosser* was indicted as an accessary before the fact, in procuring one *Rothwell* to counterfeit a half-penny. The record of *Rothwell*'s conviction was produced; and it was admitted by MR. JUSTICE GOULD, upon the authority of *Foster*, 365, that the record of the conviction of the principal was not conclusive evidence of felony against the accessary, and that he has a right to controvert the propriety of such conviction; for a record is only conclusive evidence against those who are parties to it; but his Lordship gave no positive opinion on the point.

CASE CXLIII.

THE KING *against* BAKER.

Snatching property from the hand of another is not a sufficient force to constitute a highway robbery.
S. C. 2 East, 702.

OLD BAILEY December Session 1783. The prisoner was indicted for a highway robbery. It appeared that he had snatched the property from the hands of the prosecutor, as he was passing with it on his head by the end of an alley, but without speaking to him, or stopping him, or in any way touching his person.

THE COURT thought that this *violence* was not such a degree of violence as the law required to constitute the crime of robbery; and the prisoner was accordingly acquitted of the capital part of the charge, and found *Guilty* of the single felony (*a*).

(*a*) See same point, Rex *v.* Macauley, *ante*, page 287. At Bridgewater Summer Assizes in the year 1787, one *Robins* was tried before BULLER J. for a highway robbery. Two little boys were carrying a parcel of cloth to one of the Inns in *Bath*, for the purpose of its being carried by the stage coach to *London*, when the prisoner came suddenly up, and snatching it from the head of one of them, ran off with it. THE COURT said, This is not a robbery; for there was not that sort of violence used in taking the parcel which is required by law to constitute that crime. There was the Case of one *Davies*, at the Old Bailey in the reign of Queen Anne, where a person had snatched at a sword, while it was hanging at a gentleman's side, but the gentleman perceiving the intention of the thief, instantly laid tight hold of the scabbard, which occasioned a contest and struggle between them, which ended in the sword being taken away, and this was held to be robbery: But in *Steward*'s Case, at the Old Bailey in

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BAKER'S CASE.

the year 1690, where a gentleman's hat and wig were snatched from his head without force, it was held to be *Larceny* only (1 Hawk. c. 33. s. 1.) At the Old Bailey January Session 1790, *Plunket Horner* was tried before BULLER J. for robbing *Frances Walls*, and taking from her person and against her will, an *umbrella*, which the prisoner snatched suddenly out of her hand, as she was walking along the street.—And the COURT said, that it had been held, about eighty years before, by very high authority, that the snatching any thing unawares constituted a robbery; but that it was now settled, that unless there be some struggle to keep it, and it be forced from the hands of the owner, it is not. In *Chick's Case* also, in December Session 1781, the same distinction was adopted. But where a heavy diamond pin, with a cork-screw stalk, twisted very much in a lady's hair, which was close frizzed, and strongly craped, was snatched out, and part of the hair torn away with it, this was held a sufficient degree of violence to constitute the crime of robbery. See *Moore's Case*, July Session 1784, *post*. So also where an ear-ring was snatched from a lady's ear, and the ear torn through by the violence. *Lapier's Case*, May Session 1784, *post*.

THE KING *against* JACOB THOMPSON.

CASE CXLIV.

AT the Old Bailey in December Session, 1783, *Jacob Thompson* was indicted before MR. BARON HOTHAM, for stealing, on 20th August 1782, a bank post bill of thirty pounds, in the dwelling-house of *Prescott, Grote, Culverden* and *Hollingsworth*.

A confession induced by saying, "*Unless you give me a more satisfactory account I will take you before a Magistrate;*" or by saying, "*Tell me where the things are and I will be favourable to you,*" cannot be given in evidence.

THE prisoner was porter to Messrs. *Prescott and Co.* in whose possession the note was proved to be on the evening of the 19th August, 1792; and that on the ensuing morning it was missed, together with the receiver's book in which it had been put with other bills for the purpose of being received. The book was found under a bureau bedstead in the shop, but this bill and another were missing out of it, and the payment of it was stopped at the Bank. In the month of September following the prisoner, on whom no suspicion of having taken this note had fallen, was turned away; and on the 11th August 1783, he offered this note to a Mr. *Lang*, a Hosier at *Wells* in *Somersetshire*, and after indorsing it in the name of *Charles King*, received from Mr. *Lang* a bill for twenty pounds, drawn by him, payable to a Mr. *Lloyd* in

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Wells, on Mr. *Pope*, the hosier in *Fenchurch Street*, and ten pounds in cash. On the bank bill being presented to the Bank for payment it was traced to the hand of Mr. *Lang*, by whose description of the person from whom he had received it, the prisoner was apprehended in the month of October following, at *Bridgewater*, by Mr. *Cole*, the Receiver-General for the county. On first meeting with him Mr. *Cole* asked him if his name was not *Thompson?* to which he replied in the affirmative: Mr. *Cole* then took him to his house, shewed him the bill that *Lang* had given him, and asked him if the name indorsed thereon was not his hand-writing? to which he answered, that "it was:" but on being questioned how he had got that bill into his possession, he appeared very confused—offered to give Mr. *Cole* twenty pounds for it—pressed him very much to accept the offer, and told a tale of his having received it from a man of the name of *King*, as he was travelling between *Bridgewater* and *Bristol;* on which Mr. *Cole* said, "This story is very unlikely; *Peter Lang* "denies his having ever put his name to the bill; and *Lloyd* "says he never did; *and unless you give me a more satisfac-* "*tory account I shall take you before a Magistrate.*" To which the prisoner replied, "*Why then, Sir, if you will keep* "*a secret I will tell you the whole business;*" and then made a full confession that he had stolen the bank post bill from the receiver's book.

THE Counsel for the prisoner submitted to the Court that this amounted to *a threat* to take the prisoner into custody unless he would make a confession, and therefore whatever it was that he said afterwards, could not be given in evidence; but that, if it was not considered as *a threat*, it was certainly *a promise*, by implication, and indirectly, that if he did give a more satisfactory account he should not be taken before a Magistrate, and that this means of obtaining a confession rendered such confession equally inadmissible.

THE Counsel for the Crown contended, that it was neither *a threat* to take him into custody, nor *a promise* not to prosecute; but was merely *a request* made of him to disclose what he might know of the transaction, and could not pos-

sibly have any improper influence on his mind so as to induce him to say that which was not true for the sake of personal safety.

THE COURT. It is almost impossible to be too careful upon this subject: This scarcely amounts to a threat, but it is certainly a strong invitation to him to confess, and the manner in which it seems to have been expressed renders it more efficacious. The prisoner was hardly a free agent at the time. Suppose *Mr. Cole* had said to him, "I can hang "you; you had better confess: if you do not I shall carry "you before a Magistrate:" it is certain, that a confession made under such circumstances could not have been received in evidence, but he only said, "Unless you give me a more "satisfactory account I shall take you before a Magistrate." Now, what was the understanding of the prisoner's mind upon hearing these expressions? Why, his answer explains what he conceived to be their meaning; for he immediately replied, "Why then, Sir," that is, since you will otherwise carry me before a Magistrate, "if you will keep a secret, I "will tell you the whole business," and immediately makes the desired confession. I must acknowledge, that I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject; and I am of opinion, that under the present circumstances the prisoner's confession, if it was one, ought not to be received.

THE prisoner was acquitted (*a*).

(*a*) At the Old Bailey, in February Session 1784, *Thomas Cass* was indicted for stealing, on the 4th of the same month, an iron bar, the property of *Edward Meux, Esq.* It was the bar of a window belonging to a public-house in High-street, Bloomsbury, and the prisoner, on pretence of drinking a pint of beer, contrived to take it away. On going the ensuing evening to the same house, the publican, suspecting that he was the person who had stolen the bar, sent for a constable, by whom, on the charge given, he was taken to the watch-house, where he remained all night. On the next morning the constable, as he was taking him to the Magistrate's, called with him at the publican's house, and in the conversation which took place, the publican said, "*I am in great distress about my irons; if you will tell me where they are, I will be favourable to you;*"

1784. in consequence of which the prisoner confessed that he had taken the property, and told him where it was; but there being no other evidence, MR. JUSTICE GOULD told the Jury they must acquit the prisoner; for that the *slightest hopes of mercy* held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession.

CASE CXLV.

THE KING *against* PETRIE.

A number of *petty larcenies* cannot be added together so as to constitute *grand larceny*; nor a number of *grand larcenies*, so as to make *a capital offence*.
S. C. 2 East, 740.
Staund. 24.
Dalt. 101.
2 Keb. 729.
1 Hale, 531.
1 Hawk. 145.

OLD-BAILEY January Session 1784. This was an indictment on the statute of 12 Anne, c. 7. for stealing to the amount of forty shillings in a dwelling-house.

THE prisoner was servant to the prosecutor, and had at different times purloined his master's property to a very considerable amount; but it did not appear that he had ever taken to the amount of *forty shillings* at any one particular time.

IT was held by the Court, that property stolen must not only be in the whole of such a value as the law requires to constitute a capital offence, but that it must be stolen to that amount at one and the same time; for the several values of different portions of property, which have been stolen at different times, cannot be added together for the purpose of making the offence capital, they being in fact different and independent acts of stealing. A number of distinct petty larcenies cannot be combined so as to constitute grand larceny; nor can any distinct number of grand larcenies be added together so as to constitute a capital offence.

The law of this case was confirmed by Mr. J. Ashhurst, in Rex *v.* Farley, Lent Assizes for Surrey, 1786.

CASE CXLVI.

THE KING *against* AICKLES.

To obtain a bill of exchange from an indorsee, under a pretence of getting it discounted, is felony, if the Jury find that the indorsee did not intend to leave the bill in the prisoner's possession without the money, and that he undertook to discount it with a preconcerted design to convert its produce to his own use. S. C. 2 East, 675.

AT the Old-Bailey January Session 1784, *John Henry Aickles* was tried before MR. JUSTICE HEATH, present MR.

JUSTICE ASHHURST, for stealing a bill of exchange, value one hundred pounds, the property of *Samuel Edwards*. 1784.

AICKLES'S CASE.

THE following facts appeared in evidence:

MR. EDWARDS wishing to get his own note of hand discounted, had made application to several persons in the discounting line of business for that purpose. A few days afterwards the prisoner, a total stranger to Mr. *Edwards*, left an address at his lodgings while he was from home, "*Mr. H.* "*No.* 21, *Great Pulteney-street, from six to seven in the* "*evening, or from eleven 'till twelve in the morning.*" In consequence of this address, Mr. *Edwards* the next morning called upon the prisoner in Pulteney-street; and a conversation upon the subject of money transactions taking place between them, the prisoner told Mr. *Edwards* that he was in the discounting line, and would, whenever he chose, discount a bill for him at the usual premium of 2½ *per cent. agency*, provided it was drawn upon and accepted by a person of known credit and responsibility. About three weeks after this interview, Mr. *Edwards* again called upon the prisoner; but not finding him at home, he sent his clerk, Mr. *Croxall*, the next day to enquire whether he would discount a bill of 100*l.* accepted by Mr. *Richard Wells*, of Cornhill; and to request that he would call in the City, that he might be fully satisfied of its validity. The prisoner returned with Mr. *Croxall* to the house of Mr. *Richard Wells*, in Cornhill; where he was shewn into a room to Mr. *Edwards*, who asked him the terms upon which he would discount a bill for 100*l.* provided he approved of it. The prisoner replied, "Two "and a half *per cent. agency*, exclusive of the legal interest "for two months." Mr. *Edwards* immediately delivered the bill described in the indictment into the hands of the prisoner, and referred him to Mr. *Richard Wells*, the acceptor of it, who was then present, to satisfy himself that it was a genuine acceptance. Mr. *Wells* said, the acceptance was his handwriting. The prisoner, addressing himself to Mr. *Edwards*, said, "*Sir, if you will go with me to the West end of the town,* "*to Pulteney-street, I will give you the cash.*" Mr. *Edwards* replied, "*I cannot conveniently go with you myself, but Mr.*

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" *Croxall shall attend you, and pay you the 25s. agency, and* " *the discount, on receiving the hundred pounds.*" On their departure Mr. *Edwards* whispered his clerk not to leave the prisoner without receiving the money, nor to lose sight of him; promising to follow them in half an hour. The prisoner and Mr. *Croxall* accordingly proceeded together to the prisoner's lodgings in Pulteney-street. When they arrived, the prisoner shewed Mr. *Croxall* into the parlour, and desired him to wait while he fetched the money; saying, " *It is only about three streets off, and I shall be back again* " *in a quarter of an hour.*" Mr. *Croxall* however followed him down Pulteney-street, but in turning the corner of Brewer-street lost sight of him. He walked backwards and forwards in the street for a length of time, in hope of seeing him return; but without success. During this interval Mr. *Edwards*, who had previously called at the prisoner's lodgings, came up to *Croxall*, and they returned together to the prisoner's lodgings, where they waited three days and three nights in a vain expectation of the prisoner's return. On the Saturday following, however, Mr. *Edwards* apprehended him at the house of a lady in Margaret-street, where he had that day dined. He expressed his sorrow for what had happened; made several apologies for his misconduct; and promised to return the bill; but he was carried before a Magistrate, who committed him " *on suspicion of being a common* " *cheat.*" It was proved that the bill had been seen a few days before the trial, in a state of negotiation in the hands of a Mr. *Smith*, and that a *subpœna duces tecum* had been served upon him; but he did not appear, nor was the bill produced in evidence.

Mr. Silvester. Mr. Fielding.

THE Counsel for the prisoner submitted two points to the consideration of the Court: FIRST, That the bill itself ought to have been produced in evidence. SECONDLY, That the facts, admitting them to be true, do not amount to felony.

Strange, 1210. Dr. Parnel's Case.

THE FIRST POINT. The bill is proved to be in existence, and it is incumbent on the prosecutor to produce it. He might have taken proper measures for this purpose before he had proceeded to trial. If the bill had been lost or destroyed,

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AICKLES'S CASE.

parole testimony might perhaps have been admissible; but it is a clear and settled principle of law, that *parole* testimony cannot be given of any existing *written* instrument (*a*).

SECOND POINT. To satisfy the definition of larceny, as it appears in the works of the most distinguished writers upon Crown Law, the *property* must be taken from the *possession* of another. The taking of the *property* itself, after it is once separated from the legal possession of its original proprietor, can never become a subject capable of supporting the allegation of larceny, especially if that separation be unaccompanied by those ingredients which furnish the idea of a felonious intention. The jurisprudence of the country has adopted a distinction between those acts which are committed *animo furandi*, and those which are the consequence of *artful contrivance;* and on this distinction depends the great difference between *felony* and *fraud*. The criterion of a FELONIOUS *intention* is where the act of taking is accompanied by such circumstances as plainly import it to have been by *constraint*, and *against the inclination* of the owner. "*Furtum est tractatio rei alienæ fraudulenta animo furandi* "INVITO *illo cujus res illa fuerit;*" but where the mind of the owner is beguiled by the means of some deceitful practice, and under the influence of that deceit he consents, foolishly perhaps but *voluntarily*, to part with his property, it is evidence of a FRAUDULENT *intention;* but whether, in such a case, the *property* accompanies the *delivery* or not, it will be impossible to build upon such a foundation the notion of larceny, which requires that the goods shall be obtained against the owner's consent. In the present case, there is scarcely evidence even of an intended fraud, much less any badge of felony. The prisoner, it is true, first introduced himself to the knowledge of Mr. *Edwards*, under

Glanvil, book 10. c. 13.

17 Hen. VIII. pl. 22. Pulton, 129.

(*a*) MR. JUSTICE HEATH, in answer to this objection, said, "I do not think that this rule is so general as to have no exception. If the bill had been in the custody of the prisoner, there would have been no necessity to prove that it was not in existence, but *parole testimony* might undoubtedly in such case have been given of its contents."—See How *v.* Hall, 14 East's Term Rep. 276.

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a pretence of being able to discount his note, or to get it discounted; for the circumstance of his requiring a premium for his trouble, implies that he was not to discount it himself, and it was perfectly immaterial to Mr. *Edwards* by which of these means he was to be furnished with the money; but whatever might have been his intention at that time, it was never carried into effect. Almost a month afterwards, the prosecutor makes an application to the prisoner for his assistance, and voluntarily delivers the bill into his hands, upon a trust that he was to receive the money for it. This voluntary delivery gave to the prisoner a free and unrestrained power over it, and enabled him to part with it to any person he pleased; and however the non-performance of his promise to discount it may be construed a *breach of trust*, or violation of the confidence reposed in him, it excludes every legal idea of felony. A felonious intention must have a certain commencement, evidenced by some overt act denoting that intention; but there is nothing in this case from which it is possible to discover the point at which felony begins. The possession of the note cannot be felony; for he received it by voluntary delivery from the prosecutor. Carrying it home to his lodgings cannot be felony; for to that act the prosecutor consented. Going out to get it discounted cannot be felony; for that act was permitted and assented to by Mr. *Croxall*. The getting it discounted cannot be felony; for that was the promise which the prosecutor relied upon the prisoner to perform. Nor can his neglecting to return either the money or the bill be considered as felony; for, admitting that he did in fact receive the money, the subsequent conversion of it, pressed perhaps by the importunity of some other creditor, cannot be felony; as it was never in the prosecutor's *possession*, and therefore cannot be said to have been taken *from him*. Lord *Dyer*, page 5, says, "If a man deliver an obligation to another to "receive the money due upon it, and he receives the money "upon it, and goeth away therewith, or doth convert it to "his own use, it is not felony (*a*). So also if a person de-

(*a*) See the case of Rex *v.* Walsh, 4 Taunton, Rep. 258. in which it was determined by the TWELVE JUDGES, on 14th February 1812, that a

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" liver wares or cattle to another to sell, and he selleth them " and runs away with the money." And Sir *William Staundforde*, a very accurate writer upon Crown Law, is of opinion, that " if a man deliver to another a bag of money, for the " purpose of paying it to a creditor, or of purchasing any " particular article, and he go away with it, it is not felony, " *eo que il est hors de possession.*" LORD HALE also says, " that if *A.* come to *B.* and by a *false message* or *token* re- " ceive money of him and carry it away, it is no felony, " but a cheat, punishable by indictment at common law, or " upon the statute 33 Hen. VIII. c. 1. (*a*)."

THESE objections were answered by Counsel on the part of the Crown. Mr. Garrow.

FIRST POINT. It is proved that the bill is in the hands of Mr. *Smith*, who has been served with a *subpœna* to produce it; and as he has refused to comply, parole testimony may be given of its contents. If it had been in the prisoner's possession, the next best evidence to the bill itself would have been admissible; for as a prisoner cannot be compelled, or even legally required, to produce any evidence which may operate against himself, the next best evidence which it is in the power of a prosecutor to produce, is always admitted; and in the present case, the possession of Mr. *Smith* is to be considered as the possession of the prisoner. The principle 2 Term Rep. 201.

stock-broker having advised a proprietor of stock as to the proper time of disposing of it, sold the stock for him and received the proceeds; with which the principal instructed him to purchase *Exchequer bills;* but it being too late an hour on that day, the broker lodged the money with his own banker, and gave the banker of his principal *a check* for the amount; and on the following day, the principal drew *a check* on his banker for a larger sum, and gave it to the broker to purchase *Exchequer bills;* for the amount of which *check*, the broker received of the principal's banker *Bank bills*, with a part of which he bought *Exchequer bills* for his principal, and delivered them to the banker of the principal; and with part of the residue he paid for *American stock* and *foreign coin*, which he had previously purchased *with intention to abscond*, and paid away the rest in discharge of other debts of his own, and absconded; and it was held no felony.

(*a*) And see 30 Geo. II. c. 24. and 52 Geo. III. c. 64.

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therefore, that parole testimony cannot be given of a written instrument, unless there is a strong presumption previously raised of its being lost or destroyed, is not universal and without exception (*a*).

(*a*) On the trial of an information in the Exchequer, before MR. BARON EYRE, in December 1772, against one *Le Merchand*, on 7 Geo. I. c. 21. for importing tea directly into Guernsey, it appeared that the defendant had written several *original letters* to one *Channon*, a witness on the trial. *Channon* became a bankrupt, but these letters were proved to have come again into the defendant's possession, by virtue of an order of the Court of Chancery, to deliver to *him* all letters and papers seized under *Channon's* commission. The Solicitor of the Excise, however, had contrived to take copies of them whilst they were in the hands of the clerk of the commission. Notice had been given to the defendant to produce *the original letters*, which he refused to do. The Attorney General therefore offered to read the copies in evidence. It was objected, that being a *criminal prosecution*, the defendant was not bound by the notice to produce evidence against himself; and therefore the copies could not be read in evidence against him. MR. BARON EYRE thought there was no difference in this point between *civil* and *criminal* cases, and he admitted the copies in evidence; not on the idea of the defendant's having, after notice, refused to produce the originals, but because they were the best evidence which the nature of the case would admit of, or that was in the power of the party producing them to give. The verdict turned entirely upon this evidence, and the Jury found for the Crown. On argument for a new trial, the Court discharged the rule.—In *Lager's Case*, 6 *State Trials*, 229. for high treason, it was proved that he had shewn a witness the paper, partly doubled up, which contained the treasonable matter, and then immediately put it into his pocket; and no objection was made, though in a case of high treason, to the witness giving parole testimony of that part of the contents of the paper which he had seen.—At the Old Bailey September Session 1784, *Colonel Gordon* was tried for the murder of *L. C. Thomas* in a duel. The letter from *C. Gordon* containing the challenge was carried by his servant, and delivered to the servant of *C. Thomas*. *Col. Thomas's* servant brought a letter in answer back, and delivered it to *Col. Gordon's* servant; but it did not appear that the letter was *in fact* ever delivered to *Col. Gordon* himself; yet MR. BARON EYRE admitted *an attested copy* of it to be read against the prisoner; and left it with the Jury as legal evidence, if they were of opinion that the original had ever reached the prisoner's hands. MR. BARON HOTHAM concurred; but MR. JUSTICE GOULD thought that positive proof ought to have been given, that *the original* had come into the prisoner's possession, and cited *Francis's Case*, 6 *State Trials*. It was

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SECOND POINT. I am not disposed to controvert the definition which has been given of the nature of larceny. I admit that there must be a *felonious* taking of the property from the *possession* of the proprietor, and on that admission I am perfectly contented to argue the law of this case; for I am warranted by a series of uncontroverted decisions in saying, that the bill in question was, to the moment of its conversion, not in the legal possession of the prisoner, but of Mr. *Edwards*. I acknowledge that it is highly important to the jurisprudence of the country, that the legal distinction between *fraud* and *felony* should be preserved; but it would bring a contempt on the justice of the nation, to suffer its laws to be evaded by such little contrivances as the prisoner made use of to obtain the bill. A man goes to Smithfield-market and cheapens a horse, which the owner delivers to him for the purpose of trying its paces. Upon this occasion the common understandings of mankind would perhaps decide that the *legal possession* of the owner was determined and gone by this actual delivery of the property; but in the contemplation of law, if it shall afterwards appear that the possession was obtained with intent to steal it, the delivery will not alter the *legal possession*. The case of *Sharpless* (1), about nine years ago at this place will confirm the doctrine for which I contend. *Sharpless* went to the shop of a hosier, and ordered a quantity of goods to be sent to his lodgings. The hosier with proper caution ordered the servant not to leave the goods without the money. *Sharp-*

(1) *Ante*, page 92, Case 52.

also decided in the King's Bench, in Easter Term 1789, upon the authority of *Le Merchand's Case*, that in penal actions, notice to produce papers served on the *agent* or *attorney* of the defendant is sufficient, and need not be served on the defendant himself.—Cales *v.* Winter, 3 Term Rep. 306. And in the case of How *v.* Hall it was determined, that in trover for a bond, the plaintiff may give *parole evidence* of it to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce it, 14 East's Term Rep. 274. where LORD ELLENBOROUGH, C. J. mentioned the case of one *Spragge* tried before BULLER, J. for *forging* a note which the prisoner afterwards got possession of and swallowed, and parole evidence was permitted to be given of the contents of the note.

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less, however, contrived, on pretence of wanting other articles, to send back the servant for them, and in the mean time to run away with the articles which the servant had left; and the JUDGES determined that this was a felonious taking. The same principle is, if possible, more strongly recognized in two cases determined very recently. FIRST, *the King* v. *Patch* (1). A man drops a ring, and, on pretence of dividing its produce with some by-stander, picks it up, and then delivers it to the person he intends to defraud, taking as a security for his proportion of its value, a watch, or a cloak, or any other thing, which he converts to his own use. Here there is something given for the thing stolen, and this has frequently been determined to be felony; and yet after the watch or cloak are delivered, it is impossible to say that the actual possession is not changed. The second case is *the King* v. *Pear* (2), which a very short time since received the solemn determination of all the JUDGES of England. A man hires a horse on pretence of taking a distant journey into Essex. In point of fact he never takes such a journey, but sells the horse: this is determined to be felony. But I have troubled the Court with more cases than it is necessary to cite, in support of so clear a position; and I shall therefore only state one more, in answer to the observations which have been made to prove that the possession was parted with when the note was delivered. A man goes to a public-house, and orders a pot of beer and change for a guinea to be sent to the house of Mr. *Stiles*; and when it is brought, he sends the servant back on some pretence, takes the change and goes off. Had the publican who remained in the bar of his house any more controul over, or actual possession of his money, than any man who hears me? And yet this Court has with great wisdom held, that this taking is felony (*a*). But it is asked, At what precise

(1) *Ante*, page 238, Case 119.

(2) *Ante*, page 212, Case 105.

(*a*) At the Old Bailey, in December Session 1778, *Anne Atkinson* was indicted before MR. BARON HOTHAM, present MR. JUSTICE WILLES, for stealing ten guineas, the property of *Joseph Wood*, in his dwelling-house. The prosecutor was a manufacturer, and frequently wanted silver to pay his workmen. The prisoner who lived with him as a menial ser-

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period of time the felony in the present case can be said to have commenced? I answer, Precisely at the same period of time at which it commenced in the cases I have cited. In *Pear's Case*, it commenced the instant in which he put his foot in the stirrup with an intent to steal the horse: so here the felony commenced at the instant in which the prisoner got the note into his hand, with a felonious intent to convert it to his own use.

THE COURT left the case with the Jury to consider, *first*, Whether they thought the prisoner had a preconcerted design to get the note into his possession, with an intent to steal it? and, *secondly*, Whether the prosecutor intended to part with the note to the prisoner, without having the money paid before he parted with it?

THE JURY found the affirmative of the first question, and the negative of the second; and concluded that the prisoner was therefore *Guilty*. The judgment, however, was respited, and the following questions referred to the consideration of the TWELVE JUDGES.

FIRST, Whether, as the bill in question had not been produced, the parole testimony, which had been given concerning it, was legally received?

vant, &c. went to her mistress, and told her that she was acquainted with a person who could give her ten guineas' worth of silver. Her mistress accordingly gave her ten guineas for the purpose of getting them changed into silver by the person the prisoner had mentioned; but instead of so doing she immediately ran away with the guineas and never returned, and on searching for her clothes it appeared that they had been previously taken away. The Jury found her guilty of the grand larceny, but acquitted her of the capital offence.—*Sed quære*, if the case was not saved? —But in the case of *Cath. Colman*, June Sess. 1785, the prisoner went to a public-house, and said she came from a Mrs. *Cook*, a neighbour, who would be much obliged if the publican would let her have half-a-guinea's worth of silver, and that she would send the half-guinea. She got the silver and never returned; and this was held no felony. "It was in truth, "says Mr. East, *a loan* of the silver upon the faith that the amount would "be repaid at another time. It was money obtained by *a false pretence*: "and the same determination has been made in similar cases at the Old "Bailey." 2 East, 673.

1784. SECONDLY, Whether the prisoner was guilty of FELONY, under all the circumstances of this case?

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THE JUDGES met at Serjeants'-Inn Hall to consider of this case; and they were unanimously of opinion, That the parole testimony had been properly received; and as the Jury had found a preconcerted design in the prisoner to steal the note, he had been legally convicted of felony.

IN the July Session following, he received sentence to be transported to *America*, for the term of seven years. In March 1785, however, he received the Royal pardon, on condition of transporting himself beyond the seas, within fourteen days from the day of his discharge, and giving security to the satisfaction of the RECORDER so to do; and having given such security, he was discharged from Newgate on the 14th March 1785, by virtue of the RECORDER'S warrant; but on the 26th May following, he was apprehended at Islington, and indicted for being found at large without lawful cause (1).

(1) *Vide post*, Sept. Sess. 1785.

CASE CXLVII. THE KING *against* JOHN SEAS.

Qu. Whether a coachman's livery great-coat can be considered as *goods* belonging to a *stable* within the meaning of 10 & 11 Will. III. c. 23.
S. C. 2 East, 643.
Foster, 78.

OLD BAILEY February Session 1784, the prisoner was indicted on the statute 10 & 11 Will. III. c. 23. for stealing a cloth coat called a BOX-COAT, the property of *Samuel Hayes*, Esq. privily in his stable.

IT appeared to be a livery great-coat, which the prosecutor's coachman had hung up in the stables, while he went into the house to receive his wages.

THE statute upon which the indictment was founded, excludes all persons from the benefit of clergy, who shall in any "shop, warehouse, coach-house, or stable, privately and "feloniously steal any goods, wares, or merchandises, of the "value of five shillings." But it has been uniformly held, that the goods stolen must be such as are proper to, and usually kept in, the respective places which the Act describes.

THE COURT therefore doubted, Whether a coachman's livery great-coat could be considered as any part of the proper or usual furniture of a stable; which seems only to include bridles, saddles, horse-cloths, and such other articles as are necessary or useful therein. Upon this doubt the prisoner was acquitted of the capital part of the charge; and found guilty of the larceny; but the Judgment was respited; and at the end of April Session 1784, he was ordered to be whipped and confined six months to hard labour in the house of correction. 1784.

SEAS' CASE. See an anonymous case, 8, Mod. Rep. 185.

THE KING *against* THOMAS TURNER. CASE CXLVIII.

AT the Old Bailey February Session 1784, *Thomas Turner* was tried before MR. JUSTICE BULLER, present MR. JUSTICE GOULD, and MR. BARON PERRYN, for burglary in the dwelling-house of *Edward Whitmead.*

Lofts over coach-houses and stables converted into lodging rooms, are the dwelling-houses of their inhabitants, if there be an outer door, &c. &c. S. C. 2 East, 492.

THE prosecutor was coachman to *Lady Hervey*, and rented two lodging-rooms, at six pounds ten shillings a-year, which were situated over the coach-house and stables; but he had never paid any rent, nor were they rated in the parish-books as dwelling-houses, but as appurtenances to the coach-house and stables.

THE way to the coach-house and stables was down a passage out of Mill-Hill Mews, and the Mews was an open thoroughfare both day and night. The entrance to the staircase which led to these rooms, was through a door, which was never fastened, out of the passage leading to the coach-house and stables. There was a single door at the top of the staircase to each of the prosecutor's rooms, which were locked at night; and there were other rooms over the coach-house and stables, situated in the same manner as those which the prosecutor rented. It was one of these rooms which was broke and entered by the prisoner.

THE prisoner's Counsel contended, that this was a new case; and that these rooms, which probably were originally

1784. intended as mere hay-lofts, did not, in contemplation of law, form such mansions or dwelling-houses as to become the subject of burglary.

TURNER'S CASE.

Mr. Justice Gould and Mr. Baron Perryn conceived, that the circumstance of their being situated over the coach-house and stables, would not alter the nature of the case. They were to all intents and purposes the habitation and *domicile* of the prosecutor and his family; for they are perfectly distinct and unconnected with those rooms which were inhabited by other tenants; and although the two rooms which were broke open happened to communicate with each other only by means of the landing-place, or platform, yet they may well be considered as the mansion-house of the occupier. The door at the bottom of the staircase, though unfastened, is an *outer door* common to all the inmates under the same roof; and the respective doors to the rooms of each inmate are the safeguards or *inner doors* of their several inhabitants; and cited the case of *the King* v. *Rogers* (1), determined Michaelmas Term 13 Geo. III.—Mr. Justice Buller did not give any opinion, but he said he would save the case for the consideration of the twelve Judges.

(1) *Ante*, page 89, Case 50.

The Jury found the prisoner Not Guilty of breaking and entering in the night-time; but if the Judges should be of opinion, That the place where the prosecutor inhabited was a *dwelling-house*, then Guilty of stealing to the value of forty shillings out of the dwelling-house; and if the Judges should be of opinion, That it was not a dwelling-house, then Guilty of stealing, but not in the dwelling-house.

In the July Session following the prisoner was put to the bar, and informed by Mr. Reynolds, *Clerk of the Arraigns*, that his case had been considered by the Judges; and that they were of opinion, That he was guilty of *the felony* charged against him in the indictment; and had Judgment for stealing to the value of forty shillings out of the dwelling-house.

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THE KING *against* WOOLDRIDGE.

CASE CXLIX.

What act shall be considered as a *putting off* counterfeit money within the meaning of 8 & 9 Will. III. c. 26.

S. C. 1 East, 179.

AT the Old Bailey February Session 1784, the prisoner was indicted before MR. JUSTICE GOULD, present MR. BARON PERRYN, on the statute of 8 & 9 Will. III. c. 26. s. 6. which enacts, "That whoever shall take, receive, pay or *put off* "any counterfeit milled money, or any milled money what- "soever, unlawfully diminished, and not cut in pieces, at or "for a lower rate or value than the same by its denomina- "tion doth or shall import, or was coined or counterfeited "for, shall be guilty of felony."

IT appeared in evidence, that the prisoner had carried a large quantity of counterfeited milled money, of the likeness and similitude of shillings, to the house of a Mrs. *Levey*, which she agreed to *take and receive* from him, and which he agreed to *pay and put off* to her at the rate of Twenty-nine shillings for every Guinea. In pursuance of this bargain the prisoner laid a heap of counterfeit shillings on a table, and Mrs. *Levey* proceeded to count them out at the rate before-mentioned. She had counted out three parcels containing Eighty-seven counterfeit Shillings, for which she was to pay the prisoner Three Guineas. But before she had paid him, and while the counterfeit money lay thus exposed upon the table, the officers of justice entered the room and apprehended them. Mrs. *Levey* was admitted an evidence for the Crown; and she swore that she had bought the three parcels of Shillings, and was going to pay the prisoner Three Guineas for them at the moment they were detected.

IT was contended on the part of the prisoner, that the indictment, pursuing the words of the statute, alleged this substantive fact, "that the prisoner feloniously did *put off* "the counterfeit money to *Elizabeth Levey*;" but that the evidence did not prove a *putting off*, within the true intent and meaning of the legislature; for that before the offence could be *committed*, it was necessary that the contract or agreement to *pay* and *put off* on the one hand, and to *take* and *receive* on the other, should be finally completed and

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WOOLDRIDGE'S CASE.

ended; which in this case had not taken place, Mrs. *Levey* not having paid the money to the prisoner.

On the side of the Crown it was contended, that the prisoner having *sold* and given Mrs. *Levey possession* of the counterfeit Shillings, it was on his part a completion of the contract; for he had thereby done every thing that he was enabled to do in "*paying and putting off*," and that it remained entirely with Mrs. *Levey* to fulfil the subsequent part by *taking and receiving* the counterfeit money which he had so *paid and put off*.

The Court. It is clear beyond a doubt, that the offence charged in this indictment must be measured by *the terms* of the statute upon which it is founded; and whatever progress the person indicted may have made towards *putting off* the counterfeited coin, if the act of *putting off* is not finally completed, it does not amount to the crime expressed. An ardent wish to abolish an illegal practice is certainly laudable, but Judges must take care that laws which affect the liberties and lives of their fellow-subjects are not stretched beyond their true and legal import. The practice of coining was formerly notorious in the county of York; and a general anxiety prevailed to bring every offender to punishment. A man was indicted at the Assizes, before Mr. Justice Gould, for coining a Guinea. The impressions both on the head side of it, and the reverse, were perfect and complete. It appeared, however, that the prisoner had delivered it to a person to get it changed, and that from some aukward roughness upon the edges of it, nobody would take it. The learned Judge from this circumstance conceived, that the treason, though brought very near to a completion, was not quite completed; and the case was referred to the consideration of the twelve Judges, who were unanimously of opinion, that the offence was not committed (1). In the present case the operative words of the Act of Parliament are, "take, receive, "pay, or put off;" and these words must be construed according to their popular acceptation. Now is not the common meaning of the expression, "I have *put off* such a piece "of coin," that the party has *got rid of it?* Suppose a person,

(1) The King *v.* Varley, 2 Black. Rep. 682. *Ante*, page 76, Case 42.

having looked out goods at the shop of a tradesman, is about to pay for them, and while the goods lie packed up upon the counter, the tradesman discovers that the money his customer *is paying* is counterfeit; is the money in this case either taken or *received* by the tradesman, or *paid* or *put off* by the customer? Certainly it is not. By this detection the meditated offence is rendered incomplete, and the intention to *pay* and *put off* the money disappointed. It did not reach its effect; it was stopped before it had arrived at the goal. But the legislature have themselves decided this question by a subsequent statute, which provides for the offence of *uttering* and *tendering* in payment: for it is enacted by 15 Geo. II. c. 28. "That whoever shall knowingly *utter* or *tender* in payment "any false or counterfeit money, shall suffer six months' im- "prisonment, and find sureties for good behaviour for six "months more, &c."

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WOOLDRIDGE'S CASE.

THE prisoner was acquitted of this charge; but he was convicted upon another indictment, of having *put off* a counterfeit Half-Guinea at a lower rate than it denominated: and having been before convicted of a felony, and allowed the benefit of clergy, the Counsel for the Crown, on the prisoner's pleading that privilege a second time, filed a COUNTER-PLEA of record against its being allowed; in consequence of which the prisoner received judgment of death in the September Session following.

THE KING *against* JOHN JACOBS AND OTHERS.

CASE CL.

AT the Old Bailey in February Session 1784, *John Jacobs*, *Samuel Selshire*, and *Richard Macdonald*, were tried before MR. JUSTICE GOULD for a highway robbery.

Parole evidence cannot be given of the examination of prisoners taken before the Magistrate; for it must be intended that it was put into *writing*, as the law requires.—See Rex *v.* Fearshire, *ante*, page 202. Case 101.

IT appeared that when the prisoners were carried before a Justice of the Peace, *Samuel Selshire* was admitted to give evidence against *Jacobs* and *Macdonald*, and that they all made a full confession of their guilt; but it did not appear

1784. that either the information of *Selshire*, or the confession of the other two prisoners had been taken down in writing.

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THE prosecutor attempted to give *vivâ voce* testimony of their confessions.

Mr. Reynolds. THE Clerk of the Arraigns said, it had been the constant practice of the Court, that when the Justice has neglected to take a written examination, parole testimony of it may be admitted; but that if he has reduced such examination into writing, no other evidence of it could be received.

THE COURT. The Legislature, by the statutes 1 and 2 Phil. and Mary, c. 13. s. 4. and 2 and 3 Phil. and Mary, c. 10. has ordered, "That Justices of Peace, when any prisoner "is brought before them on a charge of felony, *shall* take "the examination of the said prisoner, and the information "of them that bring him, of the fact and circumstances "thereof; and the same, or as much thereof as may be "necessary to prove the felony, *shall* be put in writing "within two days after the examination, and certified to the "next general Gaol Delivery." The statutes do not leave this matter to the option of the Magistrate, but they say that he *shall* do it; and, whatever may have crept into practice, the directions of this law ought not to be dispensed with. The rule of law is the compass by which the Court ought to be guided. What a prisoner says in other places may undoubtedly be received upon *vivâ voce* testimony; but as the law requires that his examination before the Magistrate *shall* be reduced into writing, and returned to the Court, the particulars of such examination cannot be given in evidence *vivâ voce*, unless it be clearly proved, that in fact such examination never was reduced into writing (*a*).

(*a*) In July Session 1784, *John Hinxman* was tried for a felony before MR. JUSTICE ASHHURST. The prisoner had made a confession before the Justice of the Peace, but his examination was not returned, and it was uncertain whether it had ever been reduced into writing. It was objected on the authority of *Jacobs's Case*, that parole evidence could not be given of any thing which had been disclosed by the prisoner before the Magistrate, for that it would be permitting his negligence and breach of duty to operate to the prejudice of the prisoner; as a witness by selecting only

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part of what had been said might, by using different words, give a different colour to the fact. The Court refused the oral testimony.—In January Session 1785, *Alexander Fisher* was tried before MR. JUSTICE HEATH for a burglary in the dwelling-house of *B. Ward*. The facts of Mr. *Ward's* house having been broken open in the night-time, and the goods mentioned in the indictment stolen therefrom, were clearly proved; but there was no other evidence to fix these facts upon the prisoner than his confession made on his examination before the committing Magistrate; and there being no evidence that this confession was not reduced into writing, *vivâ voce* testimony of it was rejected.—But in the case of *John Wheeling*, tried before LORD KENYON at the Summer Assizes at Salisbury 1789, it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence.

THE KING *against* WILLIAM NEWLAND.

CASE CLI.

On an indictment for forging a bank-note, *the cashier* who signed it "*For the Governor and Company of the Bank of England*" is competent witness to prove the forgery; for he is not, by such a signature, personally responsible for the payment of the note. S. C. 2 East, 1001, 1002.

AT the Old Bailey in February Session 1784, *William Newland* was indicted before MR. BARON PERRYN, present MR. SERJEANT ADAIR, Recorder, for forging a bank-note, signed "WILLIAM LANDER, *For the Governor and Com-* "*pany of the Bank of England.*"

MR. *Lander* was a Cashier of the Bank of England, properly authorized by the Directors to subscribe bank-notes with his own name for the Governor and Company; and had given security to them for the faithful performance of this duty.

THE QUESTION was, Whether Mr. *Lander* was a competent witness to prove that the bank-note charged to be forged was not *a genuine* bank-note, and that the name "*William* "*Lander*" subscribed thereto was not his hand-writing (*a*)?

(*a*) In the case of Rex *v.* Hughes on a similar prosecution with the present, tried before MR. JUSTICE LE BLANC, at Exeter Spring Assizes 1802, it was held that the hand-writing of the cashier of the bank, might be disproved by any other person, who was acquainted with his hand-writing. And in the case of Rex *v.* Dennis M'Guire, at Lancaster Spring Assizes 1801, before MR. JUSTICE CHAMBRE, a conviction for forging a Bank-note was established, on reference to the JUDGES, without the aid of the cashier's testimony to disprove his hand-writing, the forgery of which was established by other evidence, which shewed that the instrument was

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GARROW, for the prisoner, contended, that Mr. *Lander* was an incompetent witness from the interest which he had in the event of the prosecution; for, upon a supposition that he had signed the note by virtue of the authority delegated to him for that purpose by the Court of Directors, and had issued it, so signed, without carrying it to the account of the Bank, he would be liable to a criminal prosecution for the fraud, and to a civil action on his security bonds, for the damage which the Bank might eventually sustain; and therefore, although perhaps he was not personally liable to the holder for the amount of the note, he was deeply interested to swear that the name subscribed to it was a forgery, as the only means of avoiding the detection of the fraud. An interest, however faint and remote, is sufficient to destroy the competency of the witness. A commoner who comes to say that a common is not commonable but for such a number of cattle, or to such a description of persons; a corporation who would confine the exercise of a franchise; a parishioner in a question concerning the removal of a pauper; are all inadmissible witnesses, on the ground of *interest*; and yet their interest is extremely distant and minute. A master may maintain the suit of his servant; but if he acknowledge that he is under an honorary consideration to pay his costs, he cannot be examined in his cause (1). Suppose a servant assaulted in defence of his master; if on the trial of an action for this injury the master were to declare, that although he was not bound in law to defray the costs of an acquittal, yet that in honour and generosity he ought not to permit his servant to suffer, his testimony would be rejected, from the presumed bias of his mind, on the ground of interest: for, to use the words of LORD MANSFIELD, "Courts of Justice do "not sit to weigh what degree of temptation the minds of "men are capable of resisting, but to take care that they "shall not be exposed to any temptations whatsoever." If

(1) A witness was rejected on this ground by L. C. B. PARKER, *per* Mr. BARON PERRYN in Woolridge's Case, Old Bailey February Session 1784.

false in all its parts, in the texture of the paper, the watermark, the engraving, the ink, and the written date of the year, which was 1798, though the printed date under the Britannia was 1799: being altogether proved to be such as the Bank never made or issued, 2 East. C. L. 1002.

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this were the case of a common forgery, the objection would be unanswerable; for it is settled, that a person who has subscribed a note, and is therefore *primâ facie* liable to pay it, cannot be examined to impeach the security; and the interest which Mr. *Lander* has upon the present occasion cannot be thought less considerable.

Walton Assignee of Shelley *v.* Sutton, 1 Term Rep. 296.

BEARCROFT, *for the Crown.* It has been the constant and unopposed practice of Courts to admit the Cashiers of the Bank to prove the forgery of their signatures to bank-notes. It is certainly true, that when a witness is called to prove a proposition in which he is directly interested to say "*Yes*" rather than "*No*," he shall not be admitted as a witness to say "*Yes.*" I admit also, that the question is not on the quantity of interest; for if an interest amount only to five shillings, it is equally objectionable, as if it amounted to twenty thousand pounds. I admit also, that if Mr. *Lander* came here to prove the forgery of his own note, he would not be a competent witness, because his own note he would be *primâ facie* liable to pay; but Mr. *Lander*'s signature as a Cashier of the Bank does not bind himself, for it professes to be "*for the Governor and Company of the Bank of England;*" and the holder of a note so signed can call only on the Governor and Company to pay it. The fact of Mr. *Lander*'s not being personally liable, is a sufficient answer to this objection; for nothing but an immediate, direct, and personal interest, is sufficiently strong to overthrow the competency of a witness. The objection indeed cannot be speciously stated, except on a presumption of Mr. *Lander*'s having abused his trust; but the rule of law is to presume *innocence* until *guilt* be proved; and therefore an interest cannot be inferred from such a presumption, in order to ground an objection to the competency of his evidence.

THE COURT. This case is perfectly clear: Mr. *Lander* does not make himself personally responsible, by signing bank-notes in his own name "for the Governor and Company of the Bank of England;" and the law will not permit so forced and violent a presumption to be raised, as that the Case of Bent *v.* Baker. 3 Term

See Weller's Case, Onslow's Nisi Prius, 252. 1 Strange, 129. Dougl. 184. 1 Term Rep. 296. and Rep. 27.

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a man is guilty of a crime, in order to lay a platform on which to raise an objection to his competency on the ground of interest. To repel the testimony of a witness who comes to prove the forgery of his own hand-writing, it must appear that he would be liable to be sued in case it was genuine. The interest must be apparent on the face of the instrument itself, or arise immediately from the nature of the transaction, or from his own acknowledgement; for if a witness admit himself to have an interest, whether he has an interest in fact or not, yet the belief of it has an equal operation on his mind; and in either of these cases, it would be an objection to his testimony. In the present case, unless criminality be presumed, interest cannot be inferred; and such a presumption is certainly repugnant to the first principles of law.

See Mrs. Rudd's case *ante*, in March 1775, page 127, Case 70.

MR. *Lander*'s evidence was accordingly received, but the prisoner was acquitted (*a*).

(*a*) After the riots in the year 1780, a reward was offered by Government for the apprehension and conviction of any of the rioters; and a question arose, Whether persons thus interested in the conviction of the criminals were admissible witnesses against them? It was submitted to the consideration of the TWELVE JUDGES; and they unanimously agreed, That the testimony of witnesses who were intitled to and claimed the reward was admissible, notwithstanding that interest; and they mentioned the case of robbery, &c. where not only restitution of the stolen goods, but the title to the parliamentary reward, depended on the conviction of the offenders; and the case of witnesses intitled to rewards from the Bank, Post-Office, and other public places; and yet these rewards had never been considered as giving such an interest as would destroy the competency of the witness, *M. S.*—See the argument in Mrs. *Rudd*'s case upon the admissibility of Mrs. *Perreau*'s testimony, *ante*, page 127—128.

CASE CLII.

THE KING *against* HUMPHREY MOORE.

To *aid and assist* a person to the Jurors unknown, to obtain money by the practice derating with 2 East, 679.

THIS was a case reserved for the opinion of the TWELVE JUDGES by MR. SERJEANT ADAIR, Recorder, at the Old Bailey in April Session 1784, upon the trial of an indictment of *ring-dropping*, is FELONY, if the Jury find that the prisoner was confe- the person unknown to obtain the money by means of this practice.—S. C.

for stealing twenty guineas, and four pieces of foreign gold coin called *doubloons*, the property of *John Field*, in the dwelling-house of *John Brown*. 1784. MOORE'S CASE.

THE material circumstances of this case, as they appeared in evidence, were as follow: The prosecutor *John Field*, a soldier, just returned from the war in *America*, was walking along James-street, Covent-garden, when a stranger joined company with him. As they walked in friendly conversation with each other down *Long-Acre*, the stranger suddenly stopped, and picked up a purse which was lying at a door. After they had proceeded about forty yards, "Come," says the stranger, "we will go and drink a pot of porter, and "see what we have picked up." The prosecutor was persuaded to comply; and they accordingly went into a private room in an adjacent public-house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed "*W. Smith*," for 210l. "*for one brilliant diamond* "*cluster ring*," and from the other end he pulled out the ring itself. A conversation ensued upon the subject of their good fortune, during which time the prisoner *Humphrey Moore* entered the room; and being shewed the ring, he praised the beauty of its lustre, and offered to settle the division of its value. Upon the stranger's lamenting that he had no money about him, the prisoner asked the prosecutor if *he* had any. The prosecutor replied, that he had *forty* or *fifty pounds* at home. "That sum will just do," said the prisoner. A coach was immediately called, and all three were driven to the prosecutor's lodgings at *Chelsea*. The prosecutor and the stranger went into the house together, leaving the prisoner at the Five-fields. The prosecutor took his money from his bureau, put it into his pocket, and returned with the stranger to a public-house in the Five-fields, Chelsea, kept by *John Brown*, where they again met the prisoner, who said, "I will give you your share of the ring, if "you will be content till to-morrow." The prosecutor put down twenty guineas and four doubloons, which the stranger took up, and in return gave the prosecutor the ring; desiring that he would meet him at the same place on the next morn-

1784. MOORE'S CASE.

ing at nine o'clock, and promising that he would then return the twenty guineas and the four doubloons to the prosecutor, and also one hundred guineas for his share of the ring. The prisoner and the stranger went away together. The prosecutor attended the next morning pursuant to the appointment, but neither of the parties came. The ring was of a very trifling value.

IT was left with the Jury to consider, Whether the prisoner and the other man were not confederated together, for the purpose of obtaining money on pretence of sharing the value of the ring, and whether he had not aided and assisted the other man to obtain the money by the means that were used for that purpose? And the Jury were of opinion, that the prisoner was confederating with the person unknown for the purpose of obtaining the money by means of the ring, and did therefore aid and assist the person unknown in obtaining the twenty guineas and the four doubloons from the prosecutor. They accordingly found him guilty of stealing, but not in the dwelling-house, subject to the opinion of the TWELVE JUDGES, whether it was felony.

ON the first day of Michaelmas Term 1784, all the Judges except Lord MANSFIELD, assembled at Lord LOUGHBOROUGH'S Chambers, to consult upon this case; and in the December Session following Mr. JUSTICE WILLES delivered their opinion at the Old Bailey to the following effect; All the JUDGES agreed, That in considering the nature of larceny, it was necessary to attend to the distinction between the parting with the *possession* only, and the parting with the *property*; that in the first case it is felony, and in the last case it is not. Upon the circumstances of the present case *two* of the Judges (1) were of opinion, that the doubloons were to be considered as money, and that the whole was *a loan* on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced on it, and therefore that he had voluntarily parted with the *property* as well as with the *possession* of the doubloons: But *nine* of the Judges were clearly of opinion that it was felony; for they thought the twenty guineas and the four

(1) Lord Loughborough, Lord Chief Baron SKYNNER.

doubloons were deposited in the nature of *a pledge* till the half of the supposed value of the ring was paid to the prosecutor and not as *a loan*, and therefore he had parted with the *possession* only and not with the *property*; more especially as to the doubloons, which he clearly understood were to be returned the next day in specie, and they could not distinguish this case from *The King* v. *Patch* in this Court in February Session 1782 (1), and *The King* v. *Pear*, in September Session 1779 (2). The majority of the Judges therefore were of opinion, That this case had been properly left to the Jury; and that the prisoner was guilty of felony (*a*).

THE prisoner was accordingly transported (*b*).

(1) *Vide ante*, p. 238, Case 119.

(2) *Ante*, p. 212, Case 105.

(*a*) See *post*, in October Session 1784, the case of *Richard Marsh* convicted before Lord *Loughborough* for an offence of the same kind, and determined on the authority of this decision.

(*b*) The indictment was laid capitally, *viz.* stealing in the *dwelling-house*; but the property being taken from *the person* of the prosecutor, was not within the protection of 12 Anne. *Vide* S. P. Watson's case, *post*, December Session 1794.

THE KING *against* MOSES PIKE.

CASE CLIII.

An indictment for stealing goods on a *navigable river* is not satisfied by evidence of a stealing on one of its *creeks*.

S. C. 2 East, 647.

AT the Old Bailey in May Session 1784, the prisoner was tried before MR. SERJEANT ADAIR, Recorder, on the statute 24 Geo. II. c. 45. for stealing a quantity of deals "in "a certain barge on *the navigable river* THAMES."

IT appeared in evidence, that a barge full of deals, belonging to the prosecutor, was navigating down the *Thames*; but the lighterman being fearful that the barge would sink, unloaded a portion of his cargo into a long-boat, and brought both the barge and the long-boat into Limehouse-dock, where he moored them alongside each other. By the efflux of the tide they were left aground, and in the night the long-boat with the deals mentioned in the indictment, which were much above the value of forty shillings, were stolen.

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PIKE'S CASE.

THE COURT held, That this case was not conformable to the meaning of this Act of Parliament. In the construction of statutes which take away the benefit of clergy, the law requires that the fact laid in the indictment should be strictly proved; but in the present case the evidence proves that this larceny was not committed on the navigable river Thames, but on the banks of one of its creeks. It is true, the statute also takes away the benefit of clergy from any person who shall steal to the amount of forty shillings "in "any port of entry or discharge, or in any *creek* belonging "to any navigable river, port of entry or discharge;" but this being a different branch of the Act, the indictment should have charged the fact accordingly. The prisoner therefore can only be convicted of the simple larceny.

CASE CLIV.

THE KING *against* HICKMAN AND DYER.

"*A church*" is "*a building*" within the meaning of 4 Geo. II. c. 32. and an indictment for stealing lead affixed thereto, need not state the person in whom the property or the freehold resides.
S. C. 2 East, 593.

AT the Old Bailey in May Session 1784, *Joseph Hickman* and *James Dyer* were convicted before MR. BARON PERRYN, on the statute of 4 Geo. II. c. 32. for stealing lead affixed to the parish church of *Hendon*.

THE indictment contained three counts. THE FIRST COUNT charged that the prisoners, on such a day and at such a place, 150 pounds weight of lead, *belonging* to the Reverend *Carrington Garrick*, then and there fixed to a certain building called HENDON CHURCH, of the said *Carrington Garrick* then and there feloniously did steal, take, and carry away, against the peace and against the form of the statute in such case made and provided. THE SECOND COUNT stated the property as belonging to *John Bond* and *Ralph Mitcheson*, the churchwardens of the parish of *Hendon* aforesaid, then and there fixed to a certain other building called HENDON CHURCH, of the said *John Bond* and *Ralph Mitcheson*, as such churchwardens of the parish of *Hendon* aforesaid. THE THIRD COUNT laid the property as belonging to the inhabitants and parishioners of the parish of *Hendon* afore-

said, and then and there fixed to a certain other building called HENDON CHURCH, of the said inhabitants and parishioners of the parish of *Hendon* aforesaid.

PROPERTY affixed to the freehold, as in the present case, was not, at common law, the subject of larceny, provided it was severed and carried away at the same time. To remedy the inconvenience arising from this distinction, the statute upon which the indictment was founded, enacts, "That whoever shall steal, rip, cut, or break with intent to steal, any lead, iron bar, iron gate, iron palisadoes, or iron rail whatsoever, being fixed to any dwelling-house, out-house, coach-house, stable, or other building, used or occupied with such dwelling-house, or thereunto belonging, or to *any building whatsoever*, or fixed in any garden, orchard, court-yard, or outlet belonging to any dwelling-house, or *other building*, shall be guilty of FELONY."

See 21 Geo. III. c. 68. and the case of Parker and Easy, 2 East, 593.

THE COURT therefore doubted, Whether *a church* was *a building* within the meaning of the statute, and whether the lead stolen was properly laid to be the *property* of the respective persons mentioned in the indictment; and upon this doubt the case was referred to the consideration of the TWELVE JUDGES.

MR. JUSTICE WILLES, in May Session 1785, delivered the JUDGES' opinion. The words of the statute are very general and comprehensive, and the JUDGES are unanimous on the first question, that "*a church*," is included within the words "*any building whatsoever*;" and that stealing any of the species of property mentioned in the Act, from *any building* within the meaning of the Act, is felony. As to the second question regarding *the person* or *persons*, in whom the property or the freehold of the church by law resides, a majority of the JUDGES are of opinion, that the first count, charging that the lead was stolen from the parish church of *Hendon*, and laying it to be the property of the Reverend *Carrington Garrick*, the vicar, is sufficient to support this indictment; and that therefore the conviction is right. It was also thought by many of the JUDGES, that as this statute

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has made the stealing lead, &c. from *any building* a felony, the averment in the indictment that the lead was stolen from a certain building called *Hendon Church*, is of itself a description of sufficient certainty; and that the further averment in whom the stolen property resides, is immaterial and unnecessary: the allegation that it was affixed to a building, describing the sort of building, and that the building, whether church or house, belonged to such a person, being all that the law in this case requires; and that the allegation as to the property might be rejected as surplusage (*a*).

(*a*) At the Suffolk Summer Assizes June 1782, Parker and Easy were indicted on the statute 4 Geo. II. c. 32. and a majority of the JUDGES determined in Michaelmas Term 1782, that a church is within the meaning of the words "*or other building:*" and they all agreed, that the property of lead fixed to a church cannot be laid to be either in *the churchwardens* or in *the inhabitants and parishioners*. 2 East, C. L. 592, 593. In January Session 1785, *Richard Isley* was convicted upon the same Act of Parliament, for stealing lead fixed to a certain building called A CHURCH, belonging to the parish of *West-Drayton;* and the property was laid to be in, 1st, the vicar; and 2dly, the churchwardens: but the judgment was respited, and the case referred to the JUDGES, who were of opinion, That this case was exactly the same, in point of law, with that of *Hickman and Dyer*, and that his conviction was legal.

CASE CLV.

THE KING *against* JAMES LAPIER.

To force an *ear-ring* from the ear of a lady with a felonious intent to steal it, is a sufficient degree of *violence* to constitute *robbery;* and to remove it from the ear to the curls of her hair, a sufficient *carrying away*.

AT the Old Bailey in May Session 1784, *James Lapier* was indicted before MR. BARON PERRYN, for assaulting *Albina Hobart*, and taking from her person violently, and against her will, one gold ear-ring set with diamonds, value 150*l.* the property of her husband *George Hobart*, Esq.

THE circumstances of this case, as they appeared in evidence, were as follow: Mrs. *Hobart* was retiring from the Opera-house, through the King's door, towards her carriage, which had drawn up close to the pavement of the street to receive her. Whilst she was preparing to step in, she felt

S. C. 2 East, 557, 708.

1784.

LAPIER'S CASE.

a person, who was proved to be the prisoner, take hold of her ear, and pull her ear-ring as if endeavouring to pull it off. Her ear by this violence was torn entirely through; the ear-ring separated from the ear; and Mrs. *Hobart* conceived it had been *taken away:* but on her arrival at home, it was found amongst the curls of her hair. There was no proof that the ear-ring was ever seen in the prisoner's hand; but his hand was seen elevated to her ear, and at that instant Mrs. *Hobart* exclaimed, "I have lost my ear-ring."

MR. BARON PERRYN, *to the Jury.* Robbery is only an aggravated species of larceny; and to constitute a larceny, it is essential that there should not only be a *taking*, but a *carrying away.* The *taking* in the present case is very clearly proved; for the ear-ring was completely separated from the ear: but it seems questionable whether there has been a sufficient *carrying away.* A number of cases have been decided upon this subject; two of them have come before LORD MANSFIELD since I have been upon the bench. One of them was a case reserved by MR. JUSTICE NARES. A man got into a waggon where there was a bale of goods which lay in a horizontal posture. He raised it perpendicularly on its end, and while he was taking the contents of it out, he was detected by the waggoner. The JUDGES were of opinion, That as the property had not been removed from the place where it at first laid, there was not a sufficient carrying away; for a carrying away in order to constitute felony, must be a removal of the goods from *the place* where they were, and the felon must for *the instant* at least have the *entire and absolute possession* of them (*a*). The other case was reserved by my-

Cherry's Case, *ante*, in note to Coslet's Case, February Session, 1782, *ante*, page 236, Case 117.

(*a*) In the conference on this case, MR. BARON EYRE mentioned a case before him, where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter: a thief took up the goods and carried them away towards the door as far as the string would permit, and this he held not to be a severance, and consequently no felony, 2 East, P. C. 556.—And the principle of this opinion was recognized in Wilkinson's Case, 1 Hale, 508, where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take from him, and was detected with the purse in his hand, but the strings of the purse still hung to the owner's pocket by means of the keys, and this was ruled

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LAPIER'S CASE.

self (1). The Uxbridge waggon was passing along Oxford-street; and at a grocer's door, a parcel of sugar or other grocery was taken up and put into the waggon. The prisoner got into the waggon, and had removed this parcel from the head of the waggon, where it had been originally placed, to the tail of it; but he was apprehended before he had got it out of the waggon. The JUDGES held, that this was a sufficient *taking and carrying away* to constitute the offence. There is a very leading case upon this subject in print (2): A man lodged at an Inn, and in the morning before it was light took the sheets from off the bed in which he lay, *with an intent to steal them*, and carried them into the hall, where he left them, and went to the stable to get his horse, where the hostler seized him; and it was adjudged to be larceny (*a*).

(1) See *ante*, Coslet's Case, page 236, Case 117.

(2) 27 Ass. Pl. 39. Co. P. C. 108. 1 Hale, 508, 533. 3 Inst. 69.

THE Jury found the prisoner *Guilty*; but the judgment was respited, and the case submitted to the consideration of the TWELVE JUDGES.

THE JUDGES were all of opinion, that it was a sufficient taking from the person to constitute robbery; for it being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant: and it was taken by violence (*b*).

See Rex *v.* Robert Moore, *post*, page 335, Case 168.

to be no asportation; for the purse could not be said to be carried away, as it still remained fastened to the place where it was before.

(*a*) At the Lent Assizes for Cambridge, 16 Car. II. *Clement Simpson* was indicted on 39 Eliz. c. 15. for stealing in the dwelling-house. A Special Verdict was found, that he had taken plate out of a trunk, and laid it on the floor, but was apprehended before he had carried it away: and all the JUDGES were of opinion, That taking goods and *removing them from one place to another in the same house*, with an intent to steal them, is felony; for by *the taking* he hath *the possession*. Kelynge, 31. Bro. Cor. 107. 1 Hale, 368, 508. Foster, 109.

(*b*) But in the case of *Edward Farrell*, who was indicted for robbery, Old Bailey July Session 1787, it was found that the prisoner stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him. The prosecutor laid the bed on the ground; but before the prisoner could take it up so as to remove it from the spot where it lay, he was apprehended. The JUDGES were of

opinion, That the offence was not completed, and the prisoner was discharged.—So where A. had his purse tied to his girdle, and B. attempting to rob him, in the struggle the girdle broke, and the purse fell to the ground. B. not having previously taken hold of it, nor picking it up afterwards, it was ruled to be no taking. 1 Hale, 533.

1784.

CASE CLVI.

THE KING *against* ELLOR.

OLD BAILEY May Session 1784. This was an indictment on the statute 7 Geo. II. c. 22. for forging a certain order for the payment of money. The order was in the following words:

" MESSRS. SONGER,

" PLEASE to send TEN POUNDS by the bearer, as I am so " ill I cannot wait on you.

" ELIZABETH WERY."

A note, " *Please to send* 10*l. by bearer, as I am so ill I cannot wait on you,*" is not an order for the payment of money within 7 Geo. II. c. 22. S. C. 2 East, 937.

THE COURT. The Act of Parliament means such an order for payment of money, as, if genuine, the party giving it had a right to make; but this appears to be a mere letter, rather requesting the loan of money than ordering the payment of it. The terms of it do not import any thing compulsory on the part of the drawee to pay it; and in the case of *Mary Mitchel*, it was determined by NINE JUDGES against *one* (1), that the order was not within the meaning of the Act, because the direction of it was not positive, and the terms of it did not import that the party giving it had a right to the goods ordered (*a*).

(1) Foster, 130.

THE prisoner was acquitted of the *felony*, but detained; and, in July Session 1784, convicted of *the misdemeanor*.

(*a*) See the Case of George Williams, *ante*, page 114, Case 69, and Clinch's Case, *post*, January Session 1791. But if it purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it is within the statute. Locket's Case, *ante*, page 94, Case 59.

1784.

CASE CLVII.

THE KING *against* PEYTON.

In stealing from the Invalid Office at Chelsea, the property must be laid in the house of THE KING.

S. C. 2 East, 501.

OLD BAILEY May Session 1784. This was an indictment on the statute 12 Ann. c. 7. for stealing a gold watch, value fifty pounds, in the DWELLING-HOUSE of *William Henry Bunbury*, Esq.

THE house was the Invalid Office at Chelsea, which is an office under Government. The ground-floor of it was used by the Paymaster-General for the purpose of conducting the business relating to the office. Mr. *Bunbury* occupied the whole of the upper part of it; but the rent and taxes of the whole house were paid by Government.

Perryn, B. Willes, J.

THE COURT held, That it was not the dwelling-house of Mr. *Bunbury*; and the prisoner was acquitted of the capital part of the offence (*a*).

(*a*) In Aug. 14 Car. I. three persons were indicted for breaking the lodgings of *Sir Henry Hungate* at *Whitehall*; and the JUDGES were of opinion, that it should have been laid to be the King's mansion-house called WHITEHALL. 1 Hale, 522. 2 Hawk. P. C. 499. See also Cro. Car. 473. 1 Jones, 394. Cowper, 5.—At the Old Bailey in October Session, 14 Car. II. *Henry Burgess* was indicted for breaking into a chamber in *Somerset-house*, and the indictment charged it to be *domus mansionalis* of the person who lodged in it; but it was agreed that the whole house belonged to the Queen-Mother, and therefore that the indictment was bad. So, at the Old Bailey before Easter Term 1704, *Ann Hawkins* was indicted for breaking the mansion-house of *Samuel Story* in the night-time. It appeared on evidence, that the house belonged to *the Africa Company*; that *Story* was an Officer of the Company; and that he and many other persons as Officers of the Company had separate apartments in the house, in which they inhabited and lodged; and that the apartment of *Story* was broke open. It was holden by HOLT, Chief Justice, MR. JUSTICE TRACY and MR. BARON BURY, that the apartment of *Story* could not be called *his* mansion-house, because he and the others inhabit in the house merely as Officers and Servants of the Company; and thereupon *the Jury was discharged of this indictment, and it was amended* and laid to be the mansion-house of the Company. Foster, C. L. 39. See also Pickett's Case, 2 East, 501.

1784.

THE KING *against* WILLIAM PEDLEY. CASE CLVIII.

IN the King's Bench, Trinity Term 1784, a writ of *Habeas Corpus*, directed to the keeper of Bristol gaol, had been procured to bring up the body of *William Pedley*, the defendant. On reading the return, it appeared that he was detained in custody on three commitments. *First*, On an EXTENT at the suit of the Crown. *Secondly*, On MESNE PROCESS to the amount of 10,000*l.* at the suits of several creditors. *Thirdly*, On a WARRANT by Commissioners of Bankrupts, for not duly conforming to the satisfaction of the said Commissioners, touching the discovery and disclosure of his estate and effects.

A *Bankrupt* committed on *mesne process*, on *an extent* from the Crown, and also under the *Commissioners' warrant*, may be discharged *quoad* the commitment by the Commissioners, if they have mistaken *improbable* answers for *unsatisfactory* ones; for if he is perjured, he may be indicted, though he has not sworn *positively*, but only that he *believes*, &c. —*Sed vide ex parte* Nowlan, *contra*, and note (*a*) at the end of the case, page 327.

COWPER moved that he might be discharged *quoad* the commitment of the Commissioners.

LAWRENCE, *for the Commissioners.* By the statute 5 Geo. II. c. 30. s. 16. if a bankrupt shall refuse to answer, or shall not fully answer to the satisfaction of the Commissioners, all lawful questions put to him by the said Commissioners, it shall be lawful for the said Commissioners, by warrant under their hands and seals, to commit him to such prison as they shall think fit; there to remain without bail or mainprize, until he shall submit and full answer make to the satisfaction of the Commissioners.

IT appeared to the Commissioners at the last examination of the Bankrupt, that a short time before the commission issued, he had in his banker's hands the sum of 5000*l.* the whole of which he drew out, and left several of his acceptances which were then due unpaid. He was asked to give a reason for his drawing the money out of his banker's hands. He answered, "I drew it out in order to ascertain whether "my Banker would honour my drafts, when he had no mo- "ney of mine in his hands." He was then asked, If he had afterwards drawn any drafts upon his Banker for this purpose? He answered, "No." He was asked, Why he did not try this experiment on his Banker, by drawing a draft at once

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upon him for a greater sum than he had in his hands? To this question he made no answer. He was asked in what manner he disposed of the money so drawn out. He answered, "I kept it in my house, together with other monies "which I had collected elsewhere, amounting in the whole "to 7000*l.*" He was asked, Why he did not pay a bill which was then due? He answered, "I did not chuse to part "with the money." He was asked how the money was ultimately disposed of? He answered, "A fire happened, "which burnt my house and consumed the money." He was asked in what the money consisted? He answered, "I "cannot give you any other account than that which I have "already given."

On these answers he was committed by the Commissioners; but he submitted to a second examination (1): and on being again asked why he drew the money out of the Banker's hands, he gave a different reason for it to that which he had before given, and still persisted in refusing to say in what the money consisted; he was therefore remanded.

(1) It is incumbent on the bankrupt to send word when he will submit and answer the questions, *per* Buller, J. 1 Term Rep. 654,

He made his escape from the prison; and on being retaken, he acknowledged that he had secreted the notes about him to the amount of 7000*l.* but that he had since destroyed them for fear of being discovered.

Cowper, for the prisoner. These answers, however insufficient they may appear, are such as the Commissioners were bound to receive as satisfactory. Their power extends only to cases where the bankrupt refuses to answer at all, or does not fully answer; and they cannot take upon themselves to decide whether the answers be true or false. If his answers be not true, he may be indicted for perjury, but they cannot commit him. There was a case (2) lately in the Common Pleas similar to the present. The Commissioners had committed a bankrupt for giving answers which they conceived were not satisfactory. They asked, whether a part of his property, which they specified, had been sold by himself or by a broker? He answered, "*I believe* I sold them by a "broker." They desired that he would speak positively,

(2) Miller's Case, 3 Wils. 427. 2 Black. 881.

but he refused to answer in any other way than that *he believed.* And L. C. J. DE GREY said it was a mistake which mankind had fallen into, that a person could not be convicted of perjury for deposing on oath according to his *belief*; and the bankrupt was discharged. 1784. PEDLEY'S CASE.

LORD MANSFIELD. It is certainly true, that a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false. If a bankrupt swear fully and roundly, and the Commissioners have every reason to believe that what he swears is not true, yet they must take it to be satisfactory, provided that it would be satisfactory in case it were true. In the present case, every circumstance tends to shew that the bankrupt has sworn falsely. I am convinced he has perjured himself; but he has answered fully, and the Commissioners cannot commit him for false swearing. He must therefore be discharged *quoad* the commitment of the Commissioners (*a*).

(*a*) The doctrine of this Case is now exploded by the Case of *ex parte* Nowlan, 6 Term Rep. 118, in which it was determined, that if upon the examination of a bankrupt, touching the disposition of his property, he swear to an account of the same which appears to be incredible, the Commissioners may commit him to prison; for that it would be a ridiculous ceremony for the Commissioners to go through in examining a bankrupt, if they were bound to give credit to his account, however improbable or absurd it might be, merely because he has the effrontery to swear to it. They are to exercise their judgment on the whole; and if the account he gives is incredible, the Commissioners have a right to deem it unsatisfactory.

THE KING *against* THOMAS BRADY. CASE CLIX.

On the statute 31 Geo. II. c. 10. s. 24. for taking *a false oath* to obtain administration to a seaman's effects in order to receive his wages, it is necessary to prove, directly and positively, that it was the prisoner who took the oath.

AT the Old Bailey in July Session 1784, *Thomas Brady* was tried before JAMES ADAIR, Esq. Recorder of London, on the statute 31 Geo. II. c. 10, s. 24. The indictment charged, "That he, *Thomas Brady*, well knowing that one "*Michael Power*, deceased, had served our Lord the King

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" on board *the Pallas*, and that certain wages and pay were " due to him for such service, came, on the 18th November " 1783, before the Worshipful *James Harris*, then Surro- " gate to the Right Worshipful *Peter Calvert*, *Esq.* L. L. D. " and unlawfully, willingly, knowingly, and *feloniously* did " take *a false oath* that the said *Michael Power* was dead " without making any will, and that he the said *Thomas* " *Brady* was his brother and next of kin, whereas in truth " and in fact the said *Thomas Brady* was not the brother of " the said *Michael Power*, with intent to obtain letters of ad- " ministration in order to receive the said wages and pay, " due and owing to the said *Michael Power* on account of his " said service." There was a second count, stating " that " he supposing wages and pay were due," &c.

It appeared in evidence, that *the prisoner*, accompanied by another seaman, went, about the beginning of the month of November 1783, to Mr. *Mackintosh* the navy agent, and told him that he had a brother who had died on board *the Pallas;* that he wanted to administer to him, for the purpose of receiving his wages; that his name was *Thomas Power*, and that he had neither father, mother, brother or sister then living; that Mr. *Mackintosh*, believing this account to be true, introduced him to Mr. *Shepherd*, and that he witnessed *the warrant* in the registry of the Prerogative Court of Canterbury, by which it appeared that *a man*, calling himself *Thomas Power*, had taken the usual oath, namely, " that " *Michael Power* died a bachelor, intestate, without parent, " and that *he* was the natural and lawful brother of the de- " ceased;" that this warrant was signed by the name of *Thomas Power*, and that the jurat was attested by Dr. *Harris;* but who the man was that had so taken this oath, or whether the signature was the handwriting of the prisoner, Mr. *Shepherd* could not tell. It also appeared, that a man who called himself *Thomas Power* had signed the bond; that the bond was witnessed by Mr. *Mackintosh*, and one *Thomas Cruso*, but that Mr. *Mackintosh* could not tell who the person was who had so signed it, and *Thomas Cruso* could not be found. It also appeared that *the prisoner* had applied on the 5th Ja-

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BRADY'S CASE.

nuary 1784, to Mr. *Charles Pinkston*, a clerk to Mr. *Harper*, a navy agent, in the name of *Thomas Brady*, with a certificate signed by the purser of the ship *Pallas*, and an order to receive some prize-money; that while he was thus waiting in Mr. *Harper's* office, Mr. *Mackintosh*, the person through whom he had before procured letters of administration to *Michael Power*, accidentally went in, and finding that he was using a different name, conceived a suspicion of his being an impostor, and procured him to be apprehended. On enquiry, it turned out that his real name was *Thomas Brady*; that he had been an able seaman on board *the Pallas*; and that there was another able seaman, on board the same ship, of the name of *Michael Power*, but that he had no brother.

THE COURT. The statute 31 Geo. II. c. 10. s. 24. enacts, "That whosoever willingly and knowingly takes a false oath "to obtain the probate of any will or wills, or to obtain letters of administration in order to receive the payment of "any wages, pay, or other allowances of money or prize-"money due, or that were supposed to be due, to any officer, seaman, or other person who has really served, or "was supposed to have served, on board of any ship or vessel in the King's service, shall be guilty of felony without "benefit of clergy." At common law, perjury is a *misdemeanor* only, but by this statute this particular species of perjury is converted into a particular felony; but it is still incumbent on the prosecutor to fit the evidence to the particular fact, and to prove every circumstance which is necessary to bring it within the range of the law, not only by clear, precise and exact evidence, but by the best evidence that is possible to be produced. Now on the present indictment, the jet of the crime is the taking the *false oath*; and there is no instance where an indictment for *perjury* has been supported without direct and positive proof that the party took the oath on which the perjury is assigned, or where the evidence of that fact has been attempted to be supplied by inference from evidence of the other circumstances of the case. In the present case there is certainly no express, direct evidence, that the prisoner took the oath in question, but circumstantial

Extended to marines by 32 Geo. III. c. 33. s. 23.—See also 32 Geo. III. c. 34. s. 29. and 32 Geo. III. c. 69.

But see Rex *v.* Morris, *ante*, p. 50, Case 26.

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evidence only. The fact of a prisoner's having taken the oath requires as distinct a proof as the fact does of his having executed the bond; but Mr. *Shepherd*'s memory will not serve him as to the person who took the oath; and Dr. *Harris* not being here, there is no direct proof of it. The evidence therefore is defective; for there certainly is a possibility, from any thing that has been given in evidence to the contrary, that the prisoner might have gone through all the rest of the fraud, and have avoided the circumstance of taking the oath, especially as he probably knew that the taking of the oath was a capital felony. If this were an indictment for perjury at common law, it would have been incumbent on the prosecutor to give precise and positive proof that the prisoner was the person who took the oath; and it is equally incumbent on him so to do on the present occasion; for the part where the proof is defective, is the very point on which his guilt or innocence turns.

THE Counsel for the prosecution requested that the case might be saved for the opinion of THE JUDGES on a question, Whether, in an indictment on this statute, it was necessary to have direct proof of the prisoner having taken the oath, or whether that fact might not be inferred by the Jury from the other circumstances of the case.

THE COURT told the Jury, that if, notwithstanding the above observations, they were satisfied that the prisoner actually took the oath, they might find him guilty; but that, as that fact was not clearly proved, they ought to acquit him.

THE Jury found the prisoner *Not Guilty*.

CASE CLX.

THE KING *against* WILLIAM THOMAS.

On an indictment on 7 Geo. II. c. 21. for an assault with an intent to rob, the assault must be made on the person intended to be robbed.—S. C. 1 East, 417.

AT the Old Bailey, in July Session, 1784, *William Thomas* was tried before MR. JUSTICE ASHHURST on the statute 7

Geo. II. c. 21. for maliciously and feloniously assaulting, on the King's highway, one *John Lowe* with a certain offensive weapon or instrument called a pistol, with a felonious intent the monies of the said *John* from his person, and against his will, feloniously to steal, take, and carry away. 1784. THOMAS'S CASE.

MR. LOWE, the prosecutor, deposed, That about half an hour past ten in the evening of the 21st June 1784, he was travelling in a post-chaise between *Newington Turnpike* and *Ball's Pond*, when the chaise suddenly stopped, and he saw a man with his arm extended toward *the post-boy*, and heard him swear many bitter oaths with great violence, but did not hear him make any demand of money.

BENJAMIN DRING, the post-boy, swore, That the prisoner at the bar followed the chaise for some time, and at last presented a pistol *at him*, and bid him to stop, making use at the same time of many violent oaths; that he immediately stopped the chaise, and the prisoner turned toward it; but perceiving that he was pursued, he immediately rode away, without saying or doing any thing to Mr. *Lowe*, who was in the chaise; and that on his pursuers calling out, Stop thief! he was soon after taken.

THE COURT to the *Jury*. This evidence is not sufficient; for the charge in the indictment is not for an assault with intent to rob *Dring the postillion*, but with an intent to rob Mr. *Lowe*, the gentleman in the chaise: now the intention to rob Mr. *Lowe* does not appear from any act proved upon the prisoner in the present case.

THE JURY accordingly found the prisoner *Not Guilty*; but he was detained in custody, and the Grand Jury not being discharged, another indictment was found against him for an assault with intent to rob *Benjamin Dring* the postillion; but the same evidence being given as upon the former trial,

THE COURT said: The statute of 7 Geo. II. c. 21. upon which this indictment is founded, enacts, "That if any per-
"son shall, with any offensive weapon or instrument, unlaw-
"fully or maliciously assault, or shall by menaces, or in or
"by any forcible or violent manner *demand* any money,

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THOMAS'S CASE.

" goods or chattels of or from any other person, with a fe-
" lonious intent to rob, or commit robbery upon *such person*,
" he shall be guilty of felony." But it does not appear that the prisoner made any *demand* whatever upon the post-boy, or that he had any intention to rob *him*; for when he presented his pistol to *Dring* and bid him stop, he made no demand on him, but went towards the person in the chaise, who it seems was the person he intended to rob, but of whom no demand was made, and it has been decided (1) that on this branch of the statute a demand, either express or implied, must be made.

(1) *Vide* the Case of Peter Parfait, *ante*, page 19, Case 8.

CASE CLXI.

THE KING *against* JOHN SPONSONBY.

The *drawer* of a bill of exchange is a competent witness to prove that the name of *the payee* indorsed thereon is a forgery; but the drawer's letter of advice to *the payee* is not sufficient to prove his identity.

Peake, 6. 52. S. C. 2 East, 996.

OLD BAILEY July Session 1784, *John Sponsonby* was indicted before MR. SERJEANT ADAIR, Recorder, for forging an indorsement in the name of *William Pearce* on a bill of exchange *purporting* to be drawn by *Richard Davis*, in favour of *William Pearce*, on *Messrs. Crofts and Co.* for the sum of four guineas, with intention to defraud, FIRST, *Messrs. Crofts and Co.* and SECONDLY, one *John Churchill*.

THERE were also other counts for uttering the said bill, knowing the *indorsement* to be forged, with the like intention to defraud.

IT appeared in evidence, that the prisoner had gone to *Messrs. Crofts and Co.* Bankers in Pall-Mall on the day the bill was due, and on receiving the four guineas, had written the name " *John Churchill*" on the back of the bill, by way of witnessing the receipt of the money; the name " *William* " *Pearce*" being then indorsed thereon; but none of the witnesses were able to prove who the prisoner was, or whether his name was or was not *John Churchill*; nor was there any evidence given of the existence of any other *William Pearce*, than that who had received advice of this bill having been drawn in *his* favour by *Davis*.

WILLIAM PEARCE, the real payee of the bill, and an intimate acquaintance of *Richard Davis* the drawer; had re-

ceived a letter of advice from *Davis* signifying that such a bill, together with a bank-note, had been remitted to him; and desiring him, as an act of friendship, to pay their produce to one *Coles* in discharge of a debt which *Davis* owed to *Coles*. The bill never came into *Pearce*'s hands, he consequently had no property in it; and having no demand on *Davis* the drawer for its amount, it was agreed that he was a competent witness to prove that the indorsement "*William* "*Pearce*" was not his handwriting (*a*). But it was necessary first to shew, that he was the identical *William Pearce* to whom the bill was made payable: and as the testimony of *Davis* the drawer was the best evidence of that fact, and he was not present to attest it (*b*), the letter of advice which *Pearce* had received from him was held insufficient for the purpose; and therefore *Pearce*'s testimony to shew that the indorsement was forged was rejected: for although it might not be *his* handwriting, yet it might be the handwriting of a *William Pearce*; or, as he had not been proved to be the person intended as the payee of the bill, it might be the handwriting of the *William Pearce* to whom the bill was made payable.

THE prisoner was accordingly acquitted on this indictment.—But he was again tried on an indictment charging him with having forged the receipt in the name of *John*

(*a*) See Captain Smith's Case, Old Bailey January Session 1768, in which the prisoner was tried for uttering a forged receipt of one George Maughan a butcher, at the island of Granada, upon a bill for butcher's meat supplied to the ship of which the prisoner was captain: the charge was for altering the figures in the quantity of meat, and in the sum they amounted to, with intent to charge one Trinder, the owner of the ship, with larger disbursements than the captain had really laid out. To prove that these alterations were forgeries and not the handwriting of Maughan, one Greenwood his partner was produced as one who was acquainted with Maughan's hand: and it not appearing that Maughan was dead, Gould and Yeates J. held that as *he* could give the best and most satisfactory evidence whether the alterations of the bill were forged, no evidence but *his* could be admitted of the forgery, he having no degree of interest in the question, and being a competent witness on that fact. 2 East, C. L. 1000, 1001.

(*b*) See Mr. East's observations on the law of this Case, 2 East's Crown Law, p. 997.

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SPONSONBY'S CASE.

Churchill, but as no proof could be given that it was not the handwriting of the *John Churchill* whose name it purported to be, he was again acquitted (*a*).

(*a*) But see the Case of Rex *v.* Downes, Lancaster Summer Assizes 1789, before the JUDGES, in which it was determined that if the drawer's name appears to be forged on a bill as well as the indorser's, it is no objection that the drawer was not called to prove upon whom the bill was drawn, *there being two of the name at the place;* and it may be shewn by other evidence who the prisoner meant by the person whose name he forged as the payee and indorser. 2 East, C. L. 997. and the Case of Mead *v.* Young, 4 Term Rep. 28.

CASE CLXII

THE KING *against* STONE.

What shall be considered *a shop*, &c. within the 10 & 11 Will. III. c. 23.

S. C. 2 East, 643.

OLD BAILEY July Session 1784. This was an indictment on the statute 10 and 11 Will. III. c. 23. for privately stealing a watch, the property of Sir *Robert Heskett*, in the shop of *John Alcock*.

SIR ROBERT HESKETT had sent this watch to his watchmaker Mr. *Alcock*, for the purpose of being repaired, and it hung in the show-glass in Mr. *Alcock*'s shop at the time it was stolen.

See Howard's Case, in Foster's Reports, 77.

THE COURT said, that the meaning of the Act of Parliament upon which the capital part of the indictment was founded, had always been restrained to such goods only, as are exposed to sale in shops; and did not extend to mere *repositories* for goods, although they might appear in the nature of *shops*; and that as Mr. *Alcock*'s shop was not, with respect to this watch, *a place of sale*, but a mere *repository*, the prisoner ought to be acquitted of the capital part of the charge (*a*).

(*a*) At the Old Bailey, in April Session 1723, a man was indicted on this statute, for stealing *a shirt* out of *the shop* of *W. R.* It appeared in evidence, that it had been left by the owner with the master of the shop, in order that he might send it to a sempstress to mend. The Question was, Whether the prisoner was, in this case, ousted of his clergy?—THE JUDGES were of opinion that he was not, for that the statute was made as a remedy for the masters of shops to preserve their own goods, which

THE Jury accordingly found him guilty of the simple larceny only, and he was transported for seven years. 1784.

STONE'S CASE.

might be left there by way of trade, and did not extend to goods casually left there; and consequently the stealing of such goods, to the value of five shillings, was not felony without benefit of clergy.—See this Case, 8 Mod. 165.

THE KING *against* ROBERT MOORE. CASE CLXIII.

To snatch a diamond pin from the head-dress of a lady with such force as to remove it, with part of the hair, from the place in which it was fixed is a sufficient violence to constitute robbery.

See the case of Rex *v.* Lapier, *ante*, page 320, Case 155, and the Cases cited, 2 East, 708, 709.

AT the Old Bailey in July Session 1784, *Robert Moore* was tried before MR. JUSTICE ASHHURST, for feloniously assaulting *Arabella Jeffries* on the 5th June preceding, and putting her in corporal fear and danger of her life, and feloniously taking from her person and against her will, one diamond pin set in silver, of the value ten pounds, her property.

THE prosecutrix, one of the maids of honour, accompanied by her daughter, had been attending his Majesty's birth-night ball at *St. James's Palace*, on the 4th June. On their departure from the assembly-room, they were conducted by *Count Dillon* from the princesses' apartments on the back stairs towards that part of the courtyard which is called the *Angle*, where the coach had been ordered to be ready, but not being yet arrived *the Count* conducted the ladies on foot towards the great gates of the palace leading into *St. James's Street*, when their further progress was, for a short time, impeded by a row of sedan chairs, and by the concourse of people of all descriptions who usually resort to the palace on these occasions. The person of *Mrs. Jeffries*, and particularly her head-dress was decorated with a profusion of diamonds and other jewels of various kinds, but there was one consisting of seven buttons of peculiar brilliancy fixed on a long screw silver stalk of considerable weight, which was very deeply twisted into her hair, and the hair strongly craped all round it. While she was thus prevented in reaching her carriage which stood near the corner of the arch, the prisoner, who was standing close to her in the crowd, looked up very steadfastly in her face, as if taking aim at the pin, and, saying

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MOORE'S CASE.

something which she did not chuse to repeat, immediately snatched hold of this ornament, and tearing it away, together with part of her hair, ran instantly away. *Mrs. Jeffries* immediately screamed out, "Oh! my diamonds, "my diamonds!" and upon *Count Dillon*, whose arm she had hold of, turning round, he observed the prisoner's hand coming down from her head, and saw him push through the crowd to make his escape; but the Count immediately pursued him, without his being able to get out of sight, and at length seized him by the collar, but not until after he had reached a man who stood near a coach at five or six yards distance from the Palace Gates, holding a white handkerchief in his hand, into which the prisoner threw the diamond pin, and with which this coadjutor immediately slipped under the coach and got clear away. The prisoner however was secured, and delivered into the custody of the Police Officers from *Bow Street*, who immediately searched him, but on whom nothing was found; nor was the pin afterwards recovered.

The question was whether this was a taking with sufficient force and violence to constitute the crime of robbery.

And THE COURT being of opinion that it was,

THE Jury found the prisoner guilty of the whole charge.

CASE CLXIV.

THE KING *against* ANN POPE.

An indictment on the 3 Will. and Mary, c. 9. omitting to state *by whom* the lodgings were let, is bad. S. C. 2 East, 587.

ANN POPE was indicted at the Old Bailey in July Session 1784, on the statute 3 and 4 Will. and Mary, c. 9. for that she on the 15th June, &c. three blankets of the value of three shillings, and one pair of linen sheets of the value of five shillings, of the goods and chattels of one *John Webber* (the same goods and chattels being in a certain lodging-room in the dwelling-house, which by contract and agreement she the said *Ann* was to use, and which was let to the said *Ann* with the lodging aforesaid), then and there being found, feloniously did steal, take, and carry away.

THE statute of 3 Will. and Mary, c. 9. s. 5. enacts, "That

" if any person or persons shall take away with intent to " steal, embezzle, or purloin any chattels, bedding, or fur- " niture, which by contract or agreement he or they are to " use, or shall be let to him or them to use, in or with such " lodging, such taking, embezzling, or purloining, shall be " to all intents and purposes taken, reputed, and adjudged " to be larceny and felony."

1784.

POPE'S CASE.

THE COURT. This indictment is not drawn in proper form; there is a material omission in it: it does not state *by whom* the goods or the lodgings were let to the prisoner; and this is such an omission, that the prisoner cannot be convicted upon this indictment.

Adair R.

THE Jury accordingly found a verdict of *Not Guilty.*

THE KING *against* GEORGE DRUMMOND.

CASE CLXV.

AT the Old Bailey in September Session 1784, *George Drummond* was indicted before MR. BARON EYRE, present MR. JUSTICE GOULD, for robbing the *Earl of Claremont* of a gold watch, chain, seals, and trinkets.

The declaration of A CONVICT *at the moment of execution*, cannot be given in evidence as the declaration of a *dying man*; for being attainted, his testimony could not have been received on oath.

1 East, 353 *notis.*

DURING the trial, the prisoner's Counsel informed the Court, that a young man of the name of *Edwards*, very much resembling the person of the prisoner, had been recently executed for a highway robbery, and that immediately previous to the awful moment of his fate, he had communicated *something* to the Rev. Mr. *Villette*, the chaplain in ordinary of the prison, touching the commission of the identical robbery then under consideration. He therefore submitted to the Court, that as Mr. *Villette's* knowledge upon this subject had proceeded from *the solemn declaration of a dying man*, it was admissible evidence in favour of the prisoner.

THE COURT. It would be inconsistent with the rules of evidence, which are rules of justice, to examine a witness to the declaration of a person dying under the circumstances described. The principle upon which this species of evi-

See the Case of *Henrietta Radburne*, *post.* Old Bailey, July Session 1787, and *Woodcock's Case*, *post.* Old Bailey January Session 1789.

1784.

DRUMMOND'S CASE.

dence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The *declarations* therefore of a person dying under such circumstances, are considered as equivalent to the *evidence* of the living witness upon oath. But to examine a witness to the declarations of an attainted convict, would be carrying the rule of evidence beyond its possible extent, even if the person were alive; for, as an attainted convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. The fact, however, that a man resembling the person of the prisoner was executed, may be given in evidence, provided it is confined within such time as to make it probable that he was the person who committed this robbery.

THE prisoner's Counsel did not venture to call any witness to establish that fact; and the Jury found the prisoner *Guilty*.

CASE CLXVI.

THE KING *against* THOMPSON AND MACDANIEL.

The penalties on stealing in a dwelling-house, do not extend to the case of a prisoner stealing the property of another in his *own* dwelling-house.

2 East, 644.

AT the Old-Bailey September Session 1784, *Elizabeth Thompson* and *Mary Macdaniel* were indicted on the 12 Ann. c. 7. for stealing seven guineas, the monies of *Thomas Clifford*, in the dwelling-house of the *said Mary Macdaniel*.

THE statute recites, "Forasmuch as divers wicked and "ill-disposed *servants* and other persons are encouraged "to commit robberies in houses, by privilege of demanding the benefit of their clergy;" and therefore enacts, "That all and every person or persons that shall feloniously "steal any money, goods or chattels, wares or merchandises, "of the value of forty shillings or more, being in any dwelling-house or out-house thereunto belonging, although "such house or out-house be not actually broken by such.

1784.

THOMPSON'S CASE.

" offender, and although the owner of such goods, or any " other person or persons, be or be not in such house or " out-house, or shall assist or aid any person or persons to " commit any such offence, shall be debarred from the be- " nefit of clergy."

IT appeared in evidence, that the house in which the *larceny* was committed, was in fact the house of *Mary Macdaniel*; and the COURT held, that the meaning of the Legislature did not extend to the case of a person stealing in his own house(*a*).

(*a*) In January Session 1780, *Ann*, the wife of *John Gould*, was tried before MR. JUSTICE NARES, present L. C. B. SKYNNER, MR. J. ASHHURST, and MR. S. ADAIR, Recorder, for stealing a leathern purse, containing six guineas, &c. the property of *William Herring*, in the dwelling-house of the said *John Gould*.—THE JUDGES were unanimously of opinion, that the prisoner could not be convicted of the capital part of the charge, inasmuch as the felony was committed in the dwelling-house of her husband, which must be construed to be her dwelling-house, and the statute evidently means the house of another. The prisoner was therefore found guilty of the simple larceny only. This point was afterwards mentioned to MR. JUSTICE GOULD, who concurred with THE JUDGES in this opinion. *MS.*

THE KING *against* HUTCHINSON AND OTHERS.

CASE CLXVII.

AT the Old Bailey September Session 1784, *William Hutchinson*, *Thomas Lewis*, and *Daniel Wilkinson*, were tried before MR. BARON EYRE, present MR. JUSTICE GOULD, on the statute 19 Geo. II. c. 34. upon an indictment containing three counts.

The substantive clauses of the Smuggling Act enumerated. —There must be a *deliberate* assembling to bring the offenders within the penalty of the statute.

THE *first count* charged that the prisoners, with divers other persons, with fire-arms, and other offensive weapons, feloniously did assemble themselves together *in order* to be aiding and assisting in rescuing and taking away from *W. T.* and *C. S.* two of the Officers of the Excise, in the due execution of their office, 150 gallons of foreign geneva, being uncustomed goods, and liable to pay duties, &c. after seizure of the same by the Officers of the Excise as aforesaid.

The *second count* charged, that, being thus assembled, they

1784. assaulted the Officers of the Excise in the due execution of their office (*a*).

HUTCHINSON'S CASE.

THE *third count* charged, that they hindered, obstructed, opposed, and resisted the Officers, &c.

THE Officers of Excise, in consequence of an information, went to search *Hutchinson's* house, where they found a quantity of geneva in tubs concealed in a vault under the yard. Two of the prisoners struck the Officers, beat them from the vault after they had entered it, and prevented them from taking the tubs away. The Officers went in search of Constables and other assistance: but on their return, twelve or fourteen people had come drunk from an adjacent alehouse, and were carrying some of the tubs away. There was a great noise and riot, many brickbats were thrown at the officers, and one of them was knocked down and wounded, but the Smugglers were not seen to use any offensive weapon.

THE statute upon which the present indictment is founded contains five branches.

FIRST, it enacts, "That if any persons, to the number of "three or more, armed with fire-arms or other offensive "weapons, shall be assembled in order to be aiding and "assisting in the illegal exportation of goods prohibited to

(*a*) In July Session 1784, *John Shelley* was indicted at the Old Bailey on this statute, and the indictment stated, as in the present case, that the prosecutors were *Excise Officers*, and the goods seized *uncustomed goods*. No evidence was given to prove these averments, but what was to be collected from the testimony of the prosecutors themselves; and it was submitted to the Court, that being facts positively alleged, they ought to be directly and substantially proved. In answer to the first point, the statute 11 Geo. II. c. 30. s. 22. was produced, by which it is enacted, that Excise Officers acting in the execution of their duty shall be taken to be Excise Officers until the contrary shall be made appear, for that in all cases of this kind the *onus probandi* is thrown upon the prisoner. As to the second point, it was admitted, that reasonable proof ought to be given of their being uncustomed goods, and that the circumstances under which they were seized were sufficient for the Jury to exercise their judgments upon with respect to the fact.—See, as to the first point, the Gordons' Case, Northampton Spring Assizes 1789, *post*, and the case of Berryman *v.* Wise, Trinity Term, 31 Geo. III. 4 Term Rep. 366.

1784.

HUTCHINSON'S CASE.

" be exported, or the carrying off such goods in order to " such exportation, or in running, landing, or carrying away " prohibited or uncustomed goods, or goods liable to pay " any duties, which have not been paid or secured, or in the " illegal relanding of any goods whatsoever which have been " shipped or exported upon debenture or certificate, or in " rescuing or taking away the same, after seizure, from any " Officer or Officers of the Customs or Excise, or other his " Majesty's revenue, or other person or persons employed by " him or them, or assisting him or them, or from the place " where they shall be lodged by him or them, or in rescuing " any person who shall be apprehended for any of the offences " made felony by this or any other Act relating to the re- " venues of Customs or Excise, or in preventing the appre- " hending any person who shall be guilty of any such of- " fence, every person so offending shall suffer death without " the benefit of clergy."

SECONDLY, " Or in case any persons to the number of " three or more, so armed as aforesaid, shall be so aiding " or assisting, they shall suffer death without benefit of " clergy."

THIRDLY, " Or if any person shall have his face blacked, " or wear any vizard, mask, or other disguise when passing " with such goods."

FOURTHLY, " Or shall forcibly hinder, obstruct, assault, " oppose or resist any of the Officers of the Customs or Ex- " cise, or other his Majesty's revenue, in the seizing or se- " curing any such goods."

FIFTHLY, " Or if any person or persons shall maim or " dangerously wound any Officer of the Customs or Excise, " or any other his Majesty's revenue, in his attempting to " go on board any ship or vessel within the limits of any " of the ports of this kingdom, or shoot at, maim, or dan- " gerously wound him when on board such ship or vessel, " and in the due execution of his office or duty; then every " person so offending shall be adjudged guilty of felony, and " shall suffer death without benefit of clergy."

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HUTCHINSON'S CASE.

THE COURT. The *third* branch of the Act of Parliament apparently has no regard to the number of persons, nor to their being armed with offensive weapons; and therefore an individual, passing *disguised* with uncustomed goods, would in all probability be deemed within the penalties of the Act. The *fourth* branch also, being coupled by the word "OR" to the preceding sentence, seems to be a clause that would reach any individual who shall forcibly hinder or obstruct a Revenue-Officer in the execution of his duty. On this clause the third count in the present indictment is founded, and undoubtedly there is evidence to prove the fact; but by the statute of 19 Geo. III. c. 69. s. 10. this offence is reduced to a misdemeanor, punishable by corporal punishment, and the felony thereby virtually repealed. This point was settled by the TWELVE JUDGES, in the case of *the King* v. *Davies*, reserved by MR. JUSTICE GOULD from the Home Circuit (1). The second count does not appear to be supported by any of the clauses in the statute; and on the first count, which is framed on the first branch of the Act, there does not appear to be sufficient evidence to convict the prisoners. To bring offenders within the penalties of this clause, they must be armed with *offensive weapons* (*a*); and the assembling must

See the concurrent Opinions of Mr. Justice *Willes* and Mr. Baron *Perryn*, in the case of *Cornelius Rose*, May Session 1784.

(1) *Vide ante*, p. 271, Case 135.

See the Case of Thomas Gray, July Sess. 1786, who was acquitted upon the authority of this opinion.

(*a*) In B. R. Trinity Term, 15 Geo. II. it appeared in a special verdict on an indictment for this offence, that all the company had *fire-arms*, except the defendant, who had only a *common horsewhip*; and THE COURT so strongly inclined that the defendant was not guilty, that the Attorney and Solicitor-General declined to argue it; for the Act must be taken strictly; and it is a material circumstance in each man's case, that he shall be *armed* with an *offensive weapon*. 2 Strange, 1166. *Fletcher's Case.*—At Old Bailey May Session 1784, MR. JUSTICE WILLES and MR. BARON PERRYN inclined to think that a person catching up a *hatchet* accidentally, during the hurry and heat of an affray, is not being armed with an *offensive weapon* within the meaning of this Act. *The Case of Cornelius Rose.* —At the Old Bailey February Session 1785, large sticks, about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were held not to be offensive weapons; and the COURT (MR. J. GOULD, MR. B. PERRYN, and Mr. Recorder,) said on reading the preamble of the statute, that they must be such weapons as the law calls *dangerous weapons*. *Ince's Case.*—In the Case of *George Cosans*, Old Bailey May Session 1785, it was contended, upon the

1784.

HUTCHINSON'S CASE.

be deliberate, and for the express purpose of assisting in the rescue of the goods (*a*). In the present case it is quite the reverse. A set of drunken fellows come from an ale-house, and hastily set themselves to carry away the geneva, but whether with arms or without is not proved. It seems very questionable, whether the object which the Legislature had in view can be extended to the present case. The goods are found concealed in a vault; and the words of the statute manifestly allude to the circumstance of great multitudes of persons coming down upon the beach of the sea, for the purpose of escorting uncustomed goods to the places designed for their reception.

THE COURT offered Mr. Attorney-General a special verdict upon this case; but he declined to take it, and the prisoners were acquitted.

authority of *Ince's Case*, that very large club sticks, such as people ride with to defend themselves, are not offensive weapons; and on its being left to the Jury, the prisoner was acquitted: but THE COURT said, that although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say, that nothing but guns, pistols, daggers, and instruments of war should be so considered; but that bludgeons, properly so called, clubs, and any thing that is not in common use for any other purpose but a weapon, are clearly offensive weapons within the meaning of the Legislature. And in the Case of one *Franklyn*, who was committed to Norwich gaol for that he, *with others, armed*, had assisted in rescuing smuggled goods, it was said by LORD MANSFIELD, on the prisoner's being brought up to be bailed, on the ground that he himself was not *armed*, that it is not necessary, to constitute a FELONY under this Act, that every individual assembled should be armed.—See *post* and Cald. Decisions, page 246.

(*a*) Old Bailey December Session 1785, MR. JUSTICE WILLES and MR. BARON HOTHAM adopted the same opinion, and the prisoner was acquitted. *The Case of B. Spice.*—And at July Session *Thomas Gray* was tried before MR. JUSTICE HEATH, and acquitted upon the same construction of the statute.

1784.

CASE CLXVIII. THE KING *against* WILLIAM MURRAY.

If a banker's clerk be sent to the money room for money on a particular occasion, and he takes that opportunity of secreting money for his own use, he is guilty of felony.

S. C. 2 East, 638.

AT the Old Bailey October Session 1784, *William Murray* was indicted for stealing one canvas bag value 2*d.* and nine hundred and fifty-two guineas, value 999*l.* 12*s.* 0*d.* and eight shillings in monies numbered the property of *Robert*, *Henry*, and *George Drummonds*, Esqrs. and *Andrew Barclay*, Esq. in their dwelling-house. There was a SECOND COUNT for stealing the same in the house of the said *George Drummond*.

THE prisoner was a clerk to Messrs. *Drummonds* the bankers, and his department was to keep the cash book; but he had nothing at all to do with the strong room where the money is kept. The keys however of this strong room were deposited in the shop, and all the persons concerned in the house had access to the keys, and were occasionally employed to bring bags of money from the strong room. On the 5th April a bag of 1000*l.* was discovered to be missing from the strong room; and from some circumstances relating to some leaves which were found to have been torn from the waste book, a suspicion fell on the prisoner, and he at length confessed that he had taken the bag of 1000*l.* from the iron chest in the strong room, in the month of March, and also other sums at different times. It appeared that he might have been intrusted with the keys to fetch money from the strong room for the use of the shop.

Mr. Pigott.

IT was contended on the part of the prosecution, that a clerk or servant to a banker or merchant who embezzles his master's property is guilty of felony, and not, as it was generally conceived, of *a breach of trust* only. In the present case the prisoner was employed to keep the cash-book only, and was not trusted with either the receipt or payment of money. He had no charge whatever of the money of the house, or even the care and oversight of it. He may have been sent occasionally to the strong room to deposit writings or plate, or to fetch a bag of money when wanted for a particular purpose, but that will not alter the nature of his guilt, for where a clerk has only the care of or access to money for particular and special pur-

poses, as paying a bill, and at the time he secretly and clandestinely converts it to his own use, he is as much guilty of a felony as if he had no access to that drawer. If I send my servant to my library for one book, and he takes another; or if I send him for my hat and sword, and he steals my cane, he is guilty of felony. In all such cases there can be no question of his guilt. 1784. MURRAY'S CASE.

THE Counsel for the prisoner admitted that the law had been correctly stated by the counsel for the Crown; and Mr. Fielding.

THE COURT, directing the Jury to the same effect, the prisoner was found *Guilty*. Lord Loughborough.

THE KING *against* RICHARD MARSH. CASE CLXIX.

AT the Old Bailey in October Session 1784, *Richard Marsh* was indicted for stealing seventeen guineas and a half, and a twenty-five pounds bank-note from *Alexander Jack*. To obtain money by the practice of *ring-dropping* is felony.

Alexander Jack, who resided with his brother at *Richmond* in *Surry*, having a bill for 43*l*. 7*s*. 6*d*. on *Boldero and Co.* opposite the mansion house, which became due on 14 August 1784, came to town on the preceding day with a view to receive it early on the ensuing morning. As he was passing from the city on his way to the house of a friend in *Berkley Square* where he proposed to sleep that night, the prisoner went up to him on *Holborn Hill* and asked if he came from the country, and on his replying that he did, he said, "why I am come from the country also, and am going to receive some money;" to which the prosecutor replied, "I also am come to receive money, but I have come a day too soon," but before they had walked three hundred yards further, the prisoner stooped suddenly towards the pavement and picked up a purse, and exclaiming that he had found a prize, invited the prosecutor into an adjacent public-house, to see what it was their good fortune had produced. The prosecutor, who had seldom been in London before, accepted the invitation, and went into the house, in the tap-room of

1784. MARSH'S CASE.

which he observed three men who seemed to take particular notice of the prisoner, but without speaking to him. The prisoner, after looking round the room, told the prosecutor that they had better not say any thing of their good fortune there, and immediately led the prosecutor to another public-house on the opposite side of the way, where they found in a small room adjoining to the bar a good looking gentleman reading a newspaper and drinking a pint of beer. The prisoner almost immediately opened the purse and pulled out a cluster ring with a receipt, signifying that it was of the value of two hundred pounds. After some conversation had taken place respecting the manner of dividing the property between the parties, the good looking gentleman addressed himself to the prisoner saying, "suppose you give this gentleman, as he was with you when you found this prize, eighty pounds for his share." This proposal had such an effect upon the mind of the prosecutor, that he was induced to dine and to spend the greater part of the afternoon with his new companions, who, after having drank a sufficient quantity of liquor, proposed to go to some of the environs of the town to get some tea, which was acceded to by the prosecutor, and on the approach of night the good looking gentleman mentioned a place where he said they might all be very safely and genteelly accommodated with beds. A coach was accordingly called, and to this place, the name of which the prosecutor could not tell, they all retired; but upon pretence of there being only two beds then vacant, the prisoner and the prosecutor were obliged to sleep in the same bed. They rose the ensuing morning, breakfasted together, and went all three of them in a coach to *Boldero and Co.* opposite the mansion house, where the prosecutor received the bank-note and cash stated in the indictment, in payment of his bill of 43*l.* 7*s.* 6*d.* his two companions staying in the coach at the door while he went in and received it. The prosecutor returned into the coach with the money, and the prisoner ordered it to drive to some public-house, the name of which the prosecutor could not recollect, where they drank some beer. The prisoner then went out saying that he would go to his friend and fetch the eighty pound he had agreed to

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MARSH'S CASE.

give the prosecutor for his half of the ring; but he returned in about a quarter of an hour, and expressed great sorrow and vexation that he had not been able to procure it. The good looking gentleman then called the prosecutor to the door of the public-house, and recommended him to give the prisoner what money he had about him and take the purse and ring, for that it was so fine a prize he would certainly make his fortune by it, repeating, "give him what money you have about you, and come with me to No. 36 Red Lion Square, where I keep livery stables, and I will give you what money you like." The prosecutor and his adviser accordingly went from the door of the public-house, where this conversation passed, into the room where the prisoner was sitting; and the proposal being mentioned by the adviser, was assented to with seeming reluctance by the prisoner, upon a condition made by the prisoner that he would in half an hour afterwards go to No. 36 Red Lion Square, and re-deliver to the prosecutor the 43*l.* 7*s.* 6*d.* together with the 80*l.* and take back the ring, for that it was so valuable he did not like to part with it. To this condition thus proposed by the prisoner the prosecutor agreed; and he accordingly delivered to the prisoner the 43*l.* 7*s.* 6*d.* and received the ring. The prisoner then went away, and the prosecutor with the good looking gentleman walked together, towards, as the prosecutor supposed, his house in Red Lion Square, but they had scarcely proceeded half a mile when this pretended stable-keeper, making an excuse that he wanted to speak to a friend who he said had just turned the corner of a street, left the prosecutor in one of the great squares at the west end of the town, and never returned. The prosecutor inquired the way to the house of his friend in *Berkley Square*, where on telling the circumstances and producing the ring, he was immediately convinced of the gross imposition that had been practised upon him; and he went directly to the public office in Bow Street, and informed the magistrates of the transaction. The police officers from the description given of the two men, took the prosecutor to the very house where the transaction had taken place, and finding from the information of the landlady that they were right

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MARSH'S CASE.

respecting the persons who had committed the offence, they went to the house of the prisoner who was a coffee-house-keeper in Brydges Street, Covent Garden, but he had absconded. On the 12 June 1784 however, one of the police officers met him in the Hay-market, and took him into custody.

THE JURY found the prisoner *Guilty;* but

(1) *Ante*, page 314, Case 152.

THE COURT said that the case of *Humphrey Moore* (1) which was precisely similar to the present in its principle, had been reserved for the consideration of the TWELVE JUDGES in order to settle the law, whether these contrivances to obtain money are to be considered in point of law as felonious, or only as frauds punishable as misdemeanors, and that therefore the judgment in this case should be respited until that case was decided.

IN December Session 1784, the prisoner was called to the bar, and informed that as his case was exactly similar to that of *Humphrey Moore*, and no ground either in law or in fact for making any distinction between them, THE JUDGES had declared their opinion that the taking amounted to a felonious taking, and he was sentenced to be transported for seven years.

CASE CLXX.

THE KING *against* HAMILTON AND CHESSER.

Qu. Whether in an indictment on the 1 Edw. VI. c. 12. s. 10. for breaking and entering a house in the day time, evidence of breaking an inner door open, and the lock of a cupboard, after having fraudulently obtained admission into the house, is sufficient to support the indictment. See Foster, C. L. s. 108. 1 Hale. Pl. 508, 524, 527.

AT the Old Bailey in December Session 1784, *James Hamilton* and *Margaret Chesser* were indicted on the 1 Edw. VI. c. 12. s. 10. for breaking and entering the dwelling-house of *Thomas Reed* in the day time, one *Elizabeth Faulkner*, spinster, then being therein, and stealing wearing apparel to the value of twenty pounds, the property of *Mary Langley*, widow. There was a second count on the statute 12 Anne, c. 7. for stealing the same goods in the dwelling-house of *Thomas Reed.*

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HAMILTON'S CASE.

THOMAS REED was a hairdresser living in *St. James's-square*, and with whom *Mary Langley* then lodged, she having *Elizabeth Faulkner* living with her as a servant; but at the time this offence was committed neither *Langley* nor *Reed* were at home. About three o'clock in the afternoon of 12th September 1784, Mrs. *Chesser* called at *Reed*'s house on pretence of wishing to speak with one *Mary Bannister*, who had then recently left Mrs. *Langley*'s service; but on being told that she was gone away, and learning that no person was in the house but *Elizabeth Faulkner*, she departed. About ten minutes afterwards the prisoner, *James Hamilton*, accompanied by a man whom he called *Will*, came to the house and inquired for Mr. *Reed*, saying they had business of great importance to him which must not be communicated to any other person, and desiring, on being told that he was not at home, to be furnished with pen, ink, and paper, in order to write the business to him. *Elizabeth Faulkner*, not suspecting that any mischief was intended, immediately shewed *Hamilton* into the parlour, while *Will*, on his saying, "Come in, *Will*," shut the street door and followed him; but the moment they entered the room, *Hamilton* put a pistol to *Elizabeth Faulkner*'s head and commanded her to be silent, while *Will* closed the shutters of the windows, which looked into the Square, and fastened them very deliberately with the iron-bar. *Hamilton* then secured the girl, by blinding her eyes with an handkerchief, gagging her mouth with a large pear, tying both her hands and legs with tape provided for the purpose, laying her on the sofa, and sitting on her while *Will* went up stairs into Mrs. *Langley*'s room. He remained up stairs about a quarter of an hour, when he came down and went out and called a coach to the door, into which he put two bundles; and, after threatening to murder the girl if she stirred from the sofa, or made the least noise, they went away. On Mrs. *Langley*'s return home, for Mr. *Reed* was out of town, the girl was released and information immediately given to the Public Office in *Bow-street*, by whose activity the coachman that had been called to carry away the spoils was soon found. It appeared that they drove first to

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Charing-cross, where the prisoner *Margaret Chesser*, who was waiting there, got into the coach; from thence to *Temple Bar*, and then to the corner of *Chapel-street* in *Berwick-street*, where they discharged the coach, took the bundles, and went away. The prisoners *Hamilton* and *Margaret Chesser*, who shewed one of the officers *a certificate* of being married to *Hamilton*, were apprehended on the ensuing day at No. 1, *Church Yard-alley*, in *Castle Yard*, *Holborn*, where part of the property was found: and it appeared, upon examining the room from which the property was taken in Mr. *Reed*'s house, that the door of an escrutoir in the room, which was perfectly safe before *Will* went up stairs, was broken, and part of the goods taken from the escrutoir.

THE Counsel for the prisoners contended, FIRST, That the part which Mrs. *Hamilton* had acted in this business, shewed that what she did was by the coercion of her husband, and that, therefore, she could not be found guilty. SECONDLY, That as the property found did not amount to forty shillings, the prisoner could not be found guilty of the capital part of the charge contained in the second count of the indictment. And THIRDLY, That to constitute the capital offence, as described in the first count, there must be an *actual breaking* into the house, and not merely a breaking of cupboards, closets, or any thing of the like kind, after the entry is obtained; and cited MR. JUSTICE FOSTER, who says, "With regard to the single point of breaking the house, whatever kind of breaking will make a man guilty of burglary at *Common Law*, will bring him within the statute 1 Edw. VI. c. 12. s. 10. but that no act of violence short of a Common Law Burglary will: That with regard to cupboards, presses, lockers, and other fixtures of the like kind, I think we must, in favour of life, distinguish between cases relative to mere property, and such wherein life is concerned. In questions between the heir and devisee, and the executor, those fixtures may with propriety enough be considered as annexed to, and parts of the freehold. The law will presume, that it was the intention of the owner, *under whose bounty the executor claimeth*, that they should be so considered, to the end that the

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HAMILTON'S CASE.

house might remain to those who, by operation of law, or by his bequest, should become intitled to it, in the same plight he put it, or should leave it entire and undefaced: But in *capital cases*, I am of opinion that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use (*a*)."

THE Counsel for the prosecution contended, that although the goods found were not proved to amount to forty shillings, yet if the Jury should be of opinion, under all the circumstances, that the prisoner took the goods laid in the indictment, it would be a capital offence under the second count; and that as the entry had been obtained by *fraud*, it was in construction of law a sufficient breaking to support the charge in the first count.

THE COURT said, that Mrs. *Hamilton* must be acquitted, as she appeared to have acted under the influence of her husband; and left it with the Jury to consider, whether *Hamilton* had not stole the rest of the things which the prosecutor lost, as well as those which had been produced; but gave no opinion as to the other objection.

THE Jury acquitted *Margaret Hamilton*, and found her husband guilty of stealing goods in the dwelling-house to the value of forty shillings.

(*a*) See also 2 Hawk. P. C. ch. 33. s. 40. 1 Hale, P. C. 548, 562. 2 Hale, P. C. 353. 11 Co. Rep. 31.

THE KING *against* L. H. S. DURORE. CASE CLXXI.

If, in an indictment on the Black Act, for maliciously shooting at another, the offence be laid to have been committed in the dwelling-house of *John Brewer*, evidence that the name of the owner of the house was *James Brewer* is a fatal *variance*. S. C. 1 East, 415.

AT the Old Bailey in December Session 1784, *L. H. S. Durore* was indicted before MR. BARON HOTHAM on the statute 9 Geo. I. c. 22. for maliciously shooting at *H. Sandon*, in the dwelling-house of *James Brewer* and *John Sandy*.

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DUBORE'S CASE.

It appeared upon the evidence, that it was in the dwelling-house of *John Brewer* and *James Sandy*.

The Court. This is a fatal variance. The prosecutor has thought proper to state the names of the owners of the house where the fact is charged to have been committed. Perhaps this averment was not necessary to the validity of the indictment; for the statute says, "who shall maliciously shoot "at any person in any dwelling-house, *or other place (a)*;" but having averred that it was in the house of *John Brewer* and *James Sandy*, he is bound to prove it as it is laid: now the evidence is, that Mr. *Brewer*'s christian name is not *John* but *James*, and that Mr. *Sandy*'s christian name is not *James* but *John*; and when a man is charged with a capital offence of so serious a kind as the present, every strictness which the law requires must be attended to.

The Jury therefore found a verdict, *Not Guilty*.

(*a*) In the Case of Rex *v.* Harris, Salop Spring Assizes 1801, it was decided by the Twelve Judges, that a charge in an indictment on this statute, that the prisoner had fired at the prosecutor in *his own house*, in which the name was wrong stated, was within the meaning of the Act.—John Pye was convicted at Warwick 1790, before Baron Thompson, on a charge of robbing R. Ferneyhaugh, in the dwelling-house of Aaron Wilday, but it did not appear who was the owner of the house, and the Judges held the conviction proper, 2 East, 766.—So where S. Johnstone was convicted on an indictment for robbing Richard Dickins in the dwelling-house of *Joseph* Johnstone her husband, but whose christian name could not be proved, it was held, in Easter Term 1793, by all the Judges to be a proper conviction, 2 East, 786.

CASE CLXXII.

THE KING *against* HOLLAND PALMER.

All paper, upon the face of which there is *a mark* resembling *the stamp* required by the 28 Geo. III. c. 49. s. 20. imposing a stamp-duty on receipts, shall be considered as "*paper liable to the said duties*."—S. C. 2 East, 893.

At the Old Bailey December Session 1784, *Holland Palmer* was convicted before Mr. Serjeant Adair, Recorder, on the statute 28 Geo. III. c. 49. s. 20. for uttering 1000

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PALMER'S CASE.

pieces of paper with a counterfeit stamp thereon; but a question of law arose upon the construction of the statute, and the case was submitted to the consideration of the TWELVE JUDGES.

THE STATUTE, sect. 3. enacts, "That for every piece of "paper upon which any receipt or other discharge given for "the payment of money amounting to two pounds, and not "amounting to the sum of twenty pounds, shall be ingrossed, "written, or printed, there shall be charged a stamp duty "of two-pence:" and by sect. 13. the Commissioners of the Stamp-Duties are impowered "to use and provide such "stamps for the said duties as shall be requisite in that be-"half." It is also enacted by sect. 20. "That if any per-"son shall counterfeit or forge, or procure to be counter-"feited or forged, any stamp or mark directed or allowed to "be used by this Act for the purpose of denoting the duties "aforesaid, with intent to defraud his Majesty, or shall fraudu-"lently use any of the said stamps or marks with the like "intent, or shall *utter*, vend, sell, or expose to sale, *any* "*paper liable to the said duties*, with any counterfeit mark or "impression thereon, knowing the same to be counterfeited, "such person shall suffer death without benefit of clergy."

THE indictment in the FIRST COUNT, after stating that a certain stamp was provided by the statute for stamping every piece of paper upon which any receipt or other discharge given for the payment of money amounting to two pounds, and not amounting to twenty pounds, should be written or printed, with a stamp of two-pence, CHARGED, That *Holland Palmer*, intending to defraud his Majesty of such right or duty, unlawfully, fraudulently, and feloniously did *utter* and expose to sale, to one *Hannah Gabriel*, 1000 pieces of *paper liable to the said duty* of two-pence, with a counterfeit stamp upon each and every of the said pieces of paper, resembling the impression of the stamp then and there used in pursuance of the said statute, he well knowing the said impressions on the said pieces of paper, so uttered by him, &c. to be counterfeit, against the form of the statute. The SECOND COUNT

1784. was the same as the first, except that the words, "liable to "the said duty of two-pence," were left out (*a*).

PALMER'S CASE.

THE objection arose upon the words, "*papers liable to* "*the said duties,*" which, it was contended, were entirely void of the precise sense and definition to which they were applied; and incapable of any construction within the possible intention of the Legislature upon this subject: It was also objected, that the indictment had not sufficiently stated the offence according to the words of the statute.

ON the ninth day of Hilary Term 1785, all the JUDGES, except L. C. BARON SKYNNER, and MR. BARON HOTHAM, who were indisposed, assembled at LORD MANSFIELD'S Chambers, and the question was very fully and elaborately discussed.—On the first day of the February Session following, the result of the conference was delivered to this effect by

MR. JUSTICE GOULD. The objection arises upon a supposed inaccuracy of the words in the statute, "paper liable "to the said duties," in the *plural number;* which words the present indictment has properly pursued and necessarily applied to the particular *duty* in question, *viz.* the duty of two-pence on receipts, and the JUDGES are of opinion, that the indictment is properly drawn, although a *duty* of one description only is mentioned; and that in this and in every other respect it contains all the ingredients required by the Act. The material question is, What the Legislature meant by the words, "*paper liable to the duties?*" And it was said, that as one particular piece of paper cannot be *liable* to any of the duties more than another, it would follow that all the writing-paper in the world, whether manufactured in *England* or in *China*, might be considered as "paper *liable* to duties," and every utterer or seller of paper of any description, indicted for a capital offence, in having exposed to sale "paper "*liable* to the said duties." In answer to this suggestion, all the JUDGES are of opinion, that, upon a due attention to the present statute, and the subsequent statute 24 Geo. III.

(*a*) See 2 East, C. L. 893.

1784.

PALMER'S CASE.

c. 7. passed in the very next Session upon the same subject, it will appear, that the words "*paper liable to the said duties*" are capable of a clear and unequivocal meaning. There are two rules by which the expressions of the Legislature are to be interpreted. FIRST, If any part of an Act of Parliament is penned obscurely, and other passages in the same Act will elucidate that obscurity, recourse ought to be had to such context for that purpose. SECONDLY, If there are several Acts upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. By adopting these rules in the present case, it will appear, that the words "*paper liable to the said duties*" are not to be taken in the large and absurd sense which was attempted to be imposed upon them, namely, that they applied to every species of paper on which receipts might possibly be written, but were to be applied distinctly to such pieces of paper only as are *destined* or *prepared* for the uses mentioned in the statute; that is, to that paper which, if genuine, were by sect. 14. to be brought to the office to be stamped before they were written on; and if not genuine, to that paper which having stamps resembling the true ones upon them, purported to be paper duly stamped, and as such *liable to the said duties;* for by sect. 14. all paper "upon which any receipt or other discharge for the payment of money shall "be written, shall, before the same shall be written, be "brought to the Stamp-Office to be stamped." And by 24 Geo. III. c. 7. s. 1. "every person who shall write any receipt, &c. liable to a stamp-duty, upon any piece of paper "without the same being first duly stamped, or upon which "there shall not be some stamp or mark resembling the same, "shall for every such receipt, &c. so written, forfeit five "pounds;" which shews the sort of paper liable to the duties imposed, and gives an equitable exemption from the penalty, to those who have innocently written a receipt on paper, the stamp of which is not genuine. The paper therefore which is destined and prepared for the use of writing receipts thereon, is the paper meant by the words "paper "*liable* to the duties;" and therefore all paper upon the face

1784.

PALMER'S CASE.

of which a mark appears resembling the mark which the Act requires, is evidently "paper *liable* to the duties," because the preparation of thus marking it discovers the purpose for which it is designed. Upon the papers mentioned in the indictment, there appears a false stamp or impression, resembling the true stamp which the law requires for receipts: this discovers the use for which they were destined and prepared, and brings them within the general words of the Act, "*paper* "*liable to the said duties.*" The JUDGES are therefore unanimously of opinion, that the prisoner was properly convicted; for that the words "paper liable to the said duties" are to be applied, according to the subject-matter, to such paper which from the counterfeit mark upon it, appears to be prepared to be used, as if the mark were genuine, for a receipt.

IN January Session 1785, *Ann Jones* was convicted at the Old Bailey on the same statute; but her judgment was respited until the above determination was known.

BOTH the prisoners received sentence of death.

1785.

CASE CLXXIII.

THE KING *against* WILLIAM TAYLOR.

The coach-glass of a gentleman's coach standing in a coach-master's yard, may be laid to be the property of the coach-master. S. C. 2 East, 653.

AT the Old Bailey January Session 1785, *William Taylor* was indicted for stealing one plate glass for a coach-door, value fifteen shillings, and one hammer-cloth, value two shillings, the property of *John Whitworth.*

THE prosecutor, *John Whitworth*, was a coach-master, and had let a pair of horses on a job to the lady to whom the coach from which the property was stolen, belonged. The coach, at the time the things were taken away from it by the prisoner, stood in *Whitworth's* yard, in a coach-house belonging to him, and he said that it was entirely under his care, and that he considered himself answerable to the lady for every thing belonging to it.

IT was objected, that the property stolen ought to have

been laid as the property of the lady, and not of the coach-master. 1785.

TAYLOR'S CASE.

MR. RECORDER consulted EYRE, *Chief Baron*, and ASHHURST and HEATH, *Justices*; and they were all clearly of opinion that it was well laid; and the case of *Robert Statham* was remembered, who, at the Old Bailey in June Session 1773, had been convicted before MR. JUSTICE ASTON of stealing a chariot-glass from a lady's chariot, which had been put up at a coach-yard in *Chelsea*, while the owner of it was at *Ranelagh*, and the property was laid to be in the master of the yard where the chariot had been put up (*a*).

(*a*) So in the case of *Jane Todd*, in July Session 1711, it was held by L. C. J. EYRE and L. C. B. WARD, that in the case of goods belonging to a guest stolen at an inn, they may be laid to be the property either of the innkeeper or the guest.—Burnet's MS. So also in the case of *Ralph Packer*, at the Old Bailey in April Session 1714, it was held by L. C. J. PARKER, BURY, B. and TRACY, J. that goods stolen from a washerwoman, who takes in the linen of other persons to wash, may be laid to be her property; for persons of this description have a possessory property, and are answerable to their employers, and could all maintain an appeal of robbery or larceny, and have restitution.—2 East, C. L. 653. So in the case of one *Woodward*, before MR. BARON PERRYN, at Leicester Summer Assize 1796, it was held, on the authority of 4 Inst. 293. and 2 Roll. Abr. 551, that an agistor, who only takes in sheep to agist for another, may lay them to be his property; for he has a possession of them, and may maintain trespass against any who takes them away.—2 East, 653. So also the driver of a stage-coach may lay a parcel stolen from the coach to be his property, although there is no contract between him and the proprietor that he should be liable for any thing stolen.—Rex v. Deaking and Smith, Old Bailey, April Session 1800, *post*.

THE KING *against* GIBSON, MUTTON, AND WIGGS. CASE CLXXIV.

AT the Surry Lent Assizes 1785, for *Kingston*, the prisoners *Philip Gibson*, *John Mutton*, and *Henry Wiggs*, were

A *shop* adjoining to a *house*, if under the same roof, and within the curtilage, is part of the *dwelling-house*, although there be no internal communication between the shop and the house, and although no person sleep in the shop. S. C. 2 East, 508.

1785. convicted before Mr. Baron Perryn, for burglary in the dwelling-house of *Thomas Smith*, and stealing a large quantity of goods therein, the property of *John Hill*, on the 15th January 1785.

GIBSON, MUTTON, AND WIGGS'S CASE.

The case was reserved for the opinion of the TWELVE Judges upon the following statement of facts:

Thomas Smith is the owner of a house at *Esher*, in which he resides himself, to which house there is a shop adjoining built close to the house; there is no internal communication between the house and the shop, and no person sleeps in the shop; the only door to the shop is in the court-yard before the house and shop. *Thomas Smith* let the shop, together with some apartments in the house, to the said *John Hill* from year to year at the clear yearly rent of six guineas. There is only one common door to the house, which communicates as well to the apartments reserved to himself by Mr. *Smith*, as to those he lets to *John Hill*. There is a court-yard before the house and shop inclosed by a brick wall three feet high, which includes both the house and shop. In this wall, next the road, is a gate or wicket fastened by a latch, which serves as a communication to both house and shop. There is only one common door to the house, which communicates as well to *Smith*'s as to *Hill*'s apartments. The burglary was committed in the shop.

It was objected by the prisoner's Counsel, that *the shop* could not be considered as *the dwelling-house* of *Thomas Smith*, as laid in the indictment. Sentence was respited; and the above facts are stated for the opinion of the Judges.

The judgment therefore was respited until the opinion of all the Judges should be taken upon the objection.

At the Summer Assizes 1785, at *Croydon*, after all the trials were over, the three prisoners were put to the bar, and Mr. Baron Eyre stated the case upon the burglary, and said, that all the Judges of England had taken the same into consideration, and were unanimously of opinion, That the indictment was well laid in describing it to be the dwelling-house of *Smith*, who inhabited in one part; and

1785.

GIBSON, MUTTON, AND WIGGS'S CASE.

that the shop, being let with a part of the house inhabited by *Hill*, was still to be considered as part of the dwelling-house of *Thomas Smith*, it being within the same building, under the same roof, and having only one door of communication; especially as it was within one curtilage or fence, although there was no internal communication between them. But it was admitted, that if the shop had been let by itself, *Hill* not living therein, burglary could not have been committed in it, for then it would have been severed from the house: and therefore that the prisoners were duly convicted.

THEY accordingly received sentence of Death.

One offender only may be found guilty on a *joint charge* against *three*, for maliciously shooting at another, contrary to the 9 Geo. I. c. 22.

THE prisoners were also indicted upon the BLACK ACT, for that *they*, on the 15th of January last, at *Esher*, with a pistol loaded with gunpowder and a leaden bullet, maliciously and feloniously did shoot at *John Harwood* against the statute.

IT was proved upon this trial, that *Philip Gibson*, one of the three prisoners, fired the pistol at *John Harwood*; that the ball passed through his coat to his hip, and took away a piece of his hip.

THE JURY found *Philip Gibson* GUILTY; and *Mutton* and *Wiggs* NOT GUILTY.

GARROW, for the prisoner, moved in arrest of judgment, that as this indictment charged the three prisoners jointly with the same act of shooting the pistol, and two had been acquitted, one only could not be convicted of the charge; unless the indictment had contained separate charges against each of the prisoners in distinct counts.

BUT MR. BARON EYRE delivered no opinion on this point, which was also reserved for the opinion of the JUDGES (*a*).

(*a*) It seems, however, that at the conference upon this case in Easter Term 1785, GOULD, Justice, mentioned *the Coalheavers' Case*, *ante*, page 64, Case 35, as in point; and that EYRE, Baron, said, that several might be guilty of the same act of shooting, as if a string were tied to the trigger, and they all pulled it. And in Rex *v.* Young and others, BULLER, Justice, in de-

1785.

GIBSON, MUTTON, AND WIGGS'S CASE.

livering his opinion, says, "Three persons were indicted on the Black Act, for shooting at the prosecutor: they were all charged with the single act; and the indictment was held by all the JUDGES OF ENGLAND to be sufficient." 3 Term Rep. 105. It seems, however, that the JUDGES did not determine this point of the case. But in the case of one Wells, Spring Assizes Kent 1786, it was determined that the Coalheavers' Case, *ante*, July Session 1768, page 64, Case 35, is good law, and that in an indictment charging several with maliciously shooting a loaded gun, one only may be found guilty. 1 East, 414.

CASE CLXXV.

THE KING *against* TAYLOR AND SHAW.

If two persons be indicted for murder, the one as a principal in the first degree, and the other as being present, aiding and assisting to commit it, the Jury may find the principal in the first degree *Not Guilty*, and convict the principal in the second degree.

S. C. 1 East, 351.

AT the Lent Assizes for the county of *Sussex*, in the year 1785, *John Taylor* and *Alexander Shaw* were tried before MR. BARON PERRYN.

THE indictment stated, "That *John Taylor*, late of the "parish of *Saint Peter the Great*, otherwise *Subdeanry*, in "the county of *Sussex*, labourer, and *Alexander Shaw*, late "of the same place, labourer, on the 17th day of August, "in the 24th year of the reign, &c. with force and arms at "the parish aforesaid, in the county aforesaid, in and upon "one *Samuel Gillham*, in the peace of God and our said "Lord the King then and there being, feloniously and wilfully, and of their malice aforethought, did make an assault; and that the said *John Taylor* a certain gun, called "a *carbine*, of the value of 10*l.* then and there charged "with gunpowder and a leaden bullet, which said gun he "the said *John Taylor* in both his hands then and there "had and held, and at and against the said *Samuel Gillham* "then and there feloniously, wilfully, and of his malice "aforethought, did shoot off and discharge; and that the "said *John Taylor*, with the leaden bullet aforesaid, by "means of shooting off and discharging the said gun, so "loaded, to, at, and against the said *Samuel Gillham* as "aforesaid, did then and there feloniously, wilfully, and of "his malice aforethought, strike, penetrate, and wound the "said *Samuel Gillham* in and upon the right side of the

" head of him the said *Samuel Gillham* near his right tem-
" ple, giving to him the said *Samuel Gillham* then and there,
" with the leaden bullet aforesaid, by means of shooting off
" and discharging the said gun, so loaded, to, at, and against
" the said *Samuel Gillham*, and by such striking, pene-
" trating, and wounding the said *Samuel Gillham* as afore-
" said, one mortal wound in and through the head of him
" the said *Samuel Gillham*, of which said mortal wound the
" said *Samuel Gillham* did then and there instantly die; and
" that the said *Alexander Shaw* then and there feloniously,
" wilfully, and of his malice aforethought, was *present*, aid-
" ing, helping, abetting, comforting, assisting, and main-
" taining the said *John Taylor* in the felony and murder
" aforesaid, in manner and form aforesaid, to do and com-
" mit: AND THE JURORS aforesaid, upon their oath afore-
" said, do say, that the said *John Taylor* and *Alexander*
" *Shaw* him the said *Samuel Gillham*, in manner and form
" aforesaid, feloniously, wilfully, and of their malice afore-
" thought, did kill and murder, against the peace of our
" said Lord the King, his crown and dignity."

THE JURY were of opinion, that the shot by which the deceased was killed was fired by the prisoner *Alexander Shaw*, whom they found *Guilty*, and acquitted *John Taylor*.

A MOTION was made in arrest of judgment, upon the ground, that this indictment charged the prisoner *Taylor* as a principal in the murder, and the other as aiding and assisting; and that as the principal was acquitted, he that aided and assisted ought to be acquitted also.

THE learned JUDGE thought the indictment was defective, and that there ought to have been a count charging *Shaw* with the murder.

THE sentence was thereupon respited, in order to take the opinion of the TWELVE JUDGES.

AT the Summer Assizes 1785, at *Lewes*, LORD MANSFIELD was the Judge on the Crown side; but he delivered no opinion on this case.

ALL THE JUDGES, however, except BARON PERRYN, who

1785. was ill of the gout, did assemble to consider of this case; and a majority of them were of opinion, that the conviction was right; the indictment concluding that *both* the prisoners murdered *Gillham*, and the verdict finding that the prisoner *Shaw* did the fact. But no express determination was made on the case, MR. BARON PERRYN thinking, under all the circumstances, it was a proper case for a pardon (*a*). The prisoner, accordingly, received a free pardon soon after the Assizes, and he was discharged.

TAYLOR AND SHAW'S CASE.

(*a*) On an appeal of murder, in which A. was charged as having given the stroke, and B. as having been present, aiding and abetting, it appeared in evidence that it was B. who gave the stroke, and that A. was present, aiding and abetting. It was contended that as A. did not give the stroke, he could not be convicted, although the Jurors had concluded, "And so *they* murdered the deceased." But the Court said there was no force in the objection; for that in this respect there was no difference between an indictment and an appeal; and that if an indictment charge one with having given the stroke, and another with having been present, aiding and abetting, they are both principally and equally guilty. Benson *v.* Offley, 2 Show, 510. 3 Mod. 121. and see the Coalheavers' Case, *ante*, page 64, Case 35, to the like effect. So in Wallis's Case, the indictment charged A. with having given the mortal blow, and *Wallis* and E. with having been present, assisting, aiding, and abetting A. therein. But it appeared that E. first drew his sword, and with divers others, to the number of forty persons, fell upon a party of constables in May-fair, and made an affray, which lasted an hour, and in the end one of the constables was killed, but by whose hand it did not appear. A. was tried on this indictment and acquitted, and afterwards Wallis was tried on it, and by HOLT, C. J. and other JUDGES, at the Old Bailey, 14th October 1703. Though the indictment be against *Wallis* for aiding, assisting, and abetting A. who was acquitted, yet the indictment and trial of *Wallis* is well enough; for who actually did the murder is not material: the matter is that a murder was committed, and the other is but a circumstance, and all are principals in this case: therefore if a murder be proved it is well enough. Salk. 334. See also 4 Co. 42. b. 2. Hawk. c. 23. s. 89. and the Case of Winifred and Thomas Gordon, Spring Assizes 1789, *post*.

1784.

THE KING *against* WILLIAM GREENIFF.

CASE CLXXVI.

An indictment for facilitating the escape of a prisoner contrary to the 16 Geo. II. s. 31. cannot be maintained, if the *commitment* of such prisoner was only on *suspicion* of felony.

THE indictment set forth, That on the 17th October 1784, *Joseph Pasmore*, a Constable of *Saint Paul, Deptford*, had the lawful charge of *John Hill*, a prisoner then in the custody of the said *Pasmore*, to convey him to the county gaol of *Kent* by virtue of a warrant of commitment for FELONY, not being *petit Larceny*, expressed in the said warrant; that is to say, by virtue of a warrant of commitment under the hand and seal of *John Russel, Esq.* a Justice of Peace, &c. dated the 16th October 1784, directed to all and every Constable, &c. and to the Keeper of the Gaol at *Maidstone*, commanding them safely to convey and deliver into the custody of the said Keeper the said *John Hill*, being charged before the said Justice by oath of *Sarah Channer*, on a strong *suspicion of burglary* in the dwelling-house of *John Tilton*, at Greenwich, and stealing thereout two shirts, &c. and the said Keeper was required by the said warrant to receive, &c. the said *John Hill*; that the prisoner *Greeniff* feloniously assaulted the said *Pasmore* as aforesaid, having the lawful charge, &c. by virtue of the said warrant of commitment, by means whereof the said *Hill* attempted to escape from the custody of *Pasmore*; and that the said prisoner *Greeniff* did feloniously aid and assist the said *John Hill* to attempt to make his escape from the custody of the said *Pasmore*, the Constable aforesaid, against the statute.

JOSEPH PASMORE produced and proved the warrant of the 16th October 1784, which corresponded with that set forth in the indictment. As to the fact it was fully proved, and the prisoner found *Guilty*.

BUT as the Act of Parliament 16 Geo. II. c. 31. which makes the felony, says, "treason or felony," not "petit lar-"ceny," expressed in the warrant, the inclination of the learned Judge was, that this case, the warrant being only on suspicion of felony, was not a felony within the Act; he therefore respited the judgment, in order to lay the point before the TWELVE JUDGES.

1784.

GREENIFF'S CASE.

AT the Summer Assizes 1785, at *Maidstone*, immediately after the Grand Jury were sworn, &c. the prisoner was put to the bar, and MR. BARON EYRE, the Judge who presided on the Crown side, stated to the prisoner the above case *verbatim*; and then observed, that as the statute uses the words *treason or felony expressed in the warrant of commitment*, doubts had arisen among the Judges, whether the warrant of commitment, having the words *on suspicion of felony* only in the body thereof, authorizes the above conviction to be right; and it was ruled by ALL THE JUDGES, that this case must be governed by that of *Rex* v. *Walker* at the Old Bailey in 1774 (1), which was an indictment upon the second section of the statute for supplying a prisoner with instruments, where the commitment had the words *on suspicion*; therefore it was unanimously determined a commitment on suspicion was not within the statute, and that the prisoner was intitled to his discharge: and he was immediately discharged, with an admonition from the Baron.

(1) *Vide ante*, p. 97, Case 55.

1785.

CASE CLXXVII.

THE KING *against* JOHN AND PATRICK WELSH.

A counterfeit shilling produced in evidence, although it is quite smooth, and no impression of any sort discernible on it, will support an indictment for counterfeiting to the *similitude* of the legal coin, &c.

S. C. 1 East, 87, 164.

AT the Lent Assizes for the County of *Hartford*, in the year 1785, *John Welsh* and *Patrick Welsh* were indicted, for that they, on the 10th day of August 1785, at the parish of *Hatfield*, &c. "one piece of false, feigned, and counterfeited "money and coin of *the likeness and similitude of the good*, "*legal, and current money and silver coin of this realm, called* "*a shilling*, falsely and deceitfully, feloniously and traitorously "did forge, counterfeit and coin, against the form of the "statute in such case made and provided." There was a second count in like manner for coining a *sixpence*.

IT appeared in evidence, that every implement necessary for coining shillings and sixpences was found under the floor of the room where the prisoners were apprehended; and one of the prisoners was found at work upon a piece of base metal. Several counterfeit shillings and sixpences were also found in the room, and in the prisoner's pockets, in a state fit for circulation; and it was proved, that some of the same

1785.

JOHN AND PATRICK WELSH'S CASE.

1 Hale, 148. 215. 5. Bac. Abr. 129.

kind with those found had in fact been circulated. But no impression of any sort or kind was discernible upon those produced in evidence.

HUNTER, *the prisoner's Counsel*, submitted to the Court, that this evidence did not support the indictment, because it had not been proved, that the supposed counterfeit shillings and sixpences had any impression on them; and therefore they were not counterfeited to *the likeness and similitude of the good and legal coin of the realm.*

MR. BARON PERRYN thought there was nothing substantial in the objection, and the Jury found the prisoners *Guilty*; but as Mr. *Hunter* pressed him to reserve the point, the judgment was respited, and the case referred to the consideration of the TWELVE JUDGES.

MR. BARON EYRE, at the subsequent Summer Assizes, without stating the reason upon which the Judges had formed their opinion on this case, delivered the result of their deliberations by shortly stating the case and declaring, that the Judges, under all the circumstances of it, were of opinion, that the conviction was right (*a*).

THE PRISONERS afterwards received sentence of death, and were executed pursuant to the sentence.

(*a*) The JUDGES were of opinion that it was a question of fact, whether the counterfeit monies were *of the likeness and similitude of the lawful current silver coin*, called a shilling. And the Jury having so found it, the want of an impression was immaterial; because from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected: the counterfeit therefore was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression: and in the deception the offence consists. S. C. 2 East, 164.—See Rex *v.* Varley, York Assizes 1771, *ante*, page 76, Case 42, Rex *v.* Wilson, Old Bailey October Session, 1783, *ante*, page 285, Case 139.

1785.

CASE CLXXVIII.

THE KING *against* MARY JONES AND HENRY PALMER.

Forging an indenture of apprenticeship and a receipt for the apprentice fee with intent to defraud the *Stewards of the Feast of the Sons of the Clergy*, is within the statutes which make forgery a capital offence. S. C. 2 East, 991.

OLD BAILEY April Session 1785. This was an indictment on 2 Geo. II. c. 25. tried before MR. BARON EYRE, for forging a certain *deed* with the names *Richard Bulkeley* and *Edward Jones* subscribed thereto purporting to be an indenture of apprenticeship from *Edward Jones*, aged fourteen years, son of *Roderick Jones* deceased, for the term of seven years, with an intent to defraud *A. B. C. D. &c. the Stewards of the Feast of the Sons of the Clergy*. A second count charged that the prisoners, having the said *deed* in their custody, forged upon the back thereof a certain *receipt for money* with the name of *Richard Bulkeley* thereto subscribed, purporting to be a receipt from *Nathaniel Newnham* then secretary to the stewards of the Feast of the Sons of the Clergy, for twenty pounds being the consideration money mentioned in the said *deed*, with intention to defraud &c. There were also fourteen other counts for forging and uttering, laying the intention to defraud, 1st, *N. Newnham*, 2dly, *John Bacon*, 3dly, *Alexander Wood*.

See Rex *v.* Obrian. 2 Stra. 1143.

THE charitable fund of the Sons of the Clergy is raised by voluntary contributions, and allotted, by the Secretary *John Bacon, Esq.* the master of the First-Fruits Office, equally among all the Stewards, to be disposed of by them to the widows and children of such deceased clergymen, as they shall find objects worthy of relief. The prisoner *Mary Jones* was a clergyman's widow, recommended to *Admiral Hood*, and upon pretence of putting her son apprentice, obtained from him an order on Mr. *Bacon* for twenty pounds to be paid, on proper indentures being executed for that purpose, to *N. Newnham, Esq.* the treasurer of the Society. An indenture was accordingly prepared, purporting that *Edward Jones* did thereby put himself apprentice to one *Richard Bulkeley*, on the back of which was a receipt in his name for the twenty pounds, and witnessed by two persons of the names of *Lloyd* and *Morgan*. This indenture and receipt was

carried by the prisoners to Mr. *Bacon* who paid them the twenty pounds. The fact of the forgery was very clearly proved, and the prisoners were found *Guilty*. 1785.

JONES AND PALMER'S CASE.

KNOWLYS for the prisoners submitted to the Court, that the fund from which this money had been obtained, was not among any of those species of property which the Legislature had hitherto interposed to protect from the dangers of forgery by capital punishment; and that it remained, as at common law, a misdemeanor only. It amounts to *a fraud* only, and does not amount to *felony*. The property which the statutes against forgery have endeavoured to protect, is confined exclusively to that species which persons enjoy in their own individual rights, and does not extend to that which a society may hold in right of others. There is a great difference whether the funds of a charity are misapplied, or whether the ample fortune of an individual is to be injured by the artifice of designing men. The anxiety of the Legislature in the statutes against forgery is solely directed to the protection of a species of property distinct from the funds of a charitable and voluntary institution. The statutes of 5 Eliz. c. 14. and 2 Geo. II. c. 25. shew that they are intended only to prevent injury to individuals or to trade and commerce, and that the Legislature did not mean to inflict the punishment of death for injuring the funds of a private society. The statutes of 31 Geo. II. c. 22. s. 78. and the 18 Geo. III. c. 18. extend the statutes of forgery to *corporations*; which prove that those statutes before extended only to individuals, and as no statutes have extended them to the funds of charitable societies, the prisoners are not guilty of the present charge.

See Thomas's Case, Old Bailey, September Session 1800.

THE COURT. God forbid that the funds for public charities should not receive the same protection which the law affords to the private purse of every individual. The definition of forgery is, "the false making an instrument, which "purports on the face of it to be good and valid for the "purposes for which it was created, with a design to defraud "any *person* or *persons*." A Corporation is a *body politic*; and to prevent a doubt, whether the aggregate members of

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such a *body* were included under the words *person* or *persons*, the statutes of 31 Geo. II. c. 22. s. 78. and 18 Geo. III. c. 18. were made; for where there is an incorporation, the money becomes the property of the whole body, and not of the individual members who compose it. The stewards of this fund are the absolute owners of the money; it is their property; it is put into their hands upon trust, and, as between them and the subscribers, if they were to convert the money to their own use they would be personally liable. There is no difference between this case and a corporation excepting that the money is the property of the whole corporation and must be so alleged; but where the parties are not incorporated, it is the property of the several individuals. As to the argument drawn from the preambles of the 5 Eliz. and 2 Geo. II. it is sufficient to say that it is not essential to forgery that its consequences should be actual disherison, or solely affect trade and commerce. There appears to have been, in this case, a design to defraud the trustees and treasurer of this charity, for the signature of *Admiral Hood* was no good authority to Mr. *Bacon* to pay the twenty pounds upon a false deed. I am therefore extremely clear that this is forgery.

THE prisoners received judgment of death.

CASE CLXXIX.

THE KING *against* SARAH HAZEL.

A special verdict in murder must find that the fact was committed in the same county as that which is laid in the indictment, or no judgment can be given thereon; but it may be amended by the minutes taken at the trial.—And *quære*, Whether, if a mother-in-law, on perceiving a fault committed by her daughter-in-law in some work she was doing, throw a child's stool at her and kill her, and then conceal her death and hide the body, it is *murder* or *manslaughter*?

AT the Summer Assizes for the County of *Norfolk*, in the year 1785, *Sarah Hazel* was tried upon an indictment before LORD LOUGHBOROUGH, for the wilful murder of her daughter-in-law *Mary Hazel*, an infant of ten years of age.

THE Jury found a special verdict to the following effect, *viz.* "That *Mary Hazel*, the deceased, was the daughter of "*John Hazel* the prisoner's husband, by a former wife, and

" was of the age of ten years at the time of her death; that 1785.
" she lived at the house of her father with the prisoner, ———
" who was his second wife, and was under her tuition and HAZEL'S CASE.
" care; that the said *John Hazel* was a day-labourer, usually
" absent at work; that the deceased was employed by the
" prisoner in spinning; that on the 26th May last, the
" prisoner having employed the deceased to reel some yarn,
" and finding some of the skains knotted, threw at the de-
" ceased a four-legged stool which struck her on the right
" side of the head on the temple; upon that the deceased
" then staggered a little and sat down upon the said stool,
" and in about half an hour dropped off the said stool
" seemingly stupified and insensible; that she never after
" recovered her senses, but died soon after of the blow so
" given; that the said stool was always used for the deceased
" to sit upon, and was of sufficient size and weight to give
" a mortal blow; but that the prisoner did not intend at
" the time she so threw the said stool, to kill the deceased;—
" that the prisoner, after she knew the deceased was dead,
" went to the house of one *Hackall*, a neighbour, and say-
" ing she had lost the girl, desired one *Elizabeth Hackall*,
" daughter of the said *Hackall*, to go with her to look for
" the child; that the said *Elizabeth Hackall* accordingly
" went, and was with the prisoner some time looking in
" several parts of the prisoner's house, and elsewhere, for
" the child; that the prisoner went the same day to her
" husband, after she knew the child was dead, at the place
" where he worked, and inquired of him whether he had
" seen his daughter, concealing from him that the said *Mary*
" *Hazel* was dead, and suffered him to go to several places
" to inquire for her the said *Mary*, after she, the prisoner,
" knew the child was dead; that the prisoner also told seve-
" ral other persons that she had lost the child; and that the
" prisoner, on the night of the 26th May, took the body
" of the deceased, which she had concealed wrapped up in
" a cloth, and, tying the cloth round with a rope, threw it
" into the river.—But whether the prisoner be guilty of

1785. " *murder* or *manslaughter*, or *not guilty*, the Jury are igno-
" rant, and therefore pray, &c."

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THIS special verdict being removed into the King's Bench in Easter Term 1785, was argued by PARTRIDGE for the Crown, and by G. WILSON for the prisoner.

PARTRIDGE. On this special verdict the questions that arise are, Whether the prisoner be guilty of *murder*, or whether it can be extenuated to the crime of *manslaughter?* The facts, as found by the verdict, clearly amount to murder; and to prove it, it is only necessary to define the meaning of the word, and to shew what constitutes the crime. According to the best writers upon this subject, murder is when a man of sound memory, and of the age of discretion, unlawfully within any county of the realm, kills any reasonable creature with malice aforethought (1). There must be then an unlawful killing, and it must be accompanied with malice. The unlawful killing will not in the present case be denied; but the malice prepense it will be necessary to prove. It is a fundamental principle of criminal law, that when the fact of killing is established, it is incumbent on the prisoner to make out the extenuation; for the law presumes the fact to have been founded in malice until the contrary appears (2). That the killing was unlawful in the case before your Lordships, a brief recapitulation of the facts will demonstrate.—The prisoner was not the natural mother of the child, an infant of only ten years of age, employed under the dominion of the prisoner in spinning at the wheel. She was left at this work when the prisoner went out; on her return, she found that some of the skains were knotted, and without further provocation, for no other is found in the verdict, she took up the stool and threw it at her. This act it was certainly unlawful for the prisoner to do; for although she had a right to correct the child, this was not a proper instrument for that purpose. The circumstances attending it also, and the manner in which the blow was given, shew that it was unlawful; and when correction is intended, and that correction is illegally made, if a killing ensue therefrom,

(1) 3 Inst. 47.

(2) Foster, 225. Lord Ray. 1493. Strange, 773.

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the law has always decided it to be murder. In *Gregg's Case* this doctrine is expressly laid down (1).—*Gregg* had employed his apprentice, *Golding*, to do some work in his absence, and on his return found it had been neglected; the master threatened to send the apprentice to Bridewell; the apprentice replied, "I may as well work there as with such a master:" upon which, *Gregg* struck *Golding* with a bar of iron which he had in his hand, on the head; and *Golding* died of the blow; and it was held murder; for, said the CHIEF JUSTICE, if a father, master, or schoolmaster, will correct his child, servant, or scholar, they must do it with such things as are fit for correction, and not with such instruments as may probably kill them; for, otherwise, under pretence of correction, a parent may kill his child; and a bar of iron is no instrument of correction. In *Gregg's Case*, the negligence of the servant drew down the resentment of the master; and in the present case, the negligence of the child inspired the resentment of its mother-in-law; and it seems to me that in law the degree of provocation was precisely similar in both cases. There is also, in the margin of the Report of *Gregg's Case*, mention made of a man, who being at work at a pestle and mortar, took up the pestle to correct his wife with, and, she dying of the blow, it was held to be murder. And in *Holloway's Case* (2), which is the case of the park-keeper, who tied the boy to the horse's tail, it was held murder because the correction was excessive. These authorities are sufficient to satisfy the Court that the killing was unlawful.—As to the MALICE, it is true the Jury have found that the prisoner by throwing the stool had no intention to kill the child; but I conceive that this finding does not alter the case. Malice prepense does not consist so much in an absolute intention to kill, as to do mischief; nor so much in its being intended against the deceased in particular, as against mankind in general (3). *Sir Michael Foster* says, that "malice, as de-
"scriptive of the crime of murder, is not to be considered
"as a principle of malevolence towards particulars only,
"but whether the fact hath been attended with such cir-
"cumstances as are the ordinary symptoms of a wicked,

(1) Kely. 64.

(2) 1 Hale, 454. Cro. Car. 131.

(3) Foster's C. L. p. 256.

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"depraved, and malignant spirit." Where no malice is expressed, the law will frequently imply it, as where one man kills another upon insufficient provocation (1); and if the last article had not been inserted in the special verdict, no doubt could have remained that malice existed upon the present occasion.—But if that article is to have any weight, I shall contend that it ought not to have been inserted. The *malus animus* is to be judged of by *the Court*.(2), and not by the Jury (3). *Lord Raymond* says, "Though there have been so many special verdicts in "murder, there never was one where the Jury found in ex- "press terms that the act was done with or without malice, "on a sudden quarrel, in a passion, or from provocation, "or that it was deliberate; but that matter is to be left to "the judgment of the Court from the facts found by the "Jury." But as the Jury have found it in the present case, the question is, whether it makes any difference? Certainly it does not. The law does not require that an original intention to kill should precede the act of killing; it is sufficient if the intended act be unlawful, and if the consequence of such unlawful act be probable homicide, and death actually ensue, it will be murder (4). *Sir Matthew Hale* confirms this doctrine, and expressly says, "If the "intent be not to kill, but only to commit mischief, yet if "death ensue, it is murder." In *Gregg's Case*, there was no apparent intention to kill the apprentice; and if any such intention had existed in the mind of the park-keeper in *Holloway's Case*, he would have adopted a mode more certain and expeditious than that of tying the boy to the horse's tail. Cruelty in the extreme is perceptible in both *Gregg's Case* and *Holloway's Case*, but no original intention to kill; yet the Court implied the malice, and declared the offenders guilty of murder (5). *Sir Edward Coke* says, "If "a man, knowing that people are in the street, throw a "stone over a wall with intention only to fear them, or give "them a slight hurt, and thereupon one is killed, this is "murder; for he had an evil intent, though that intent did "not extend to death, and he knew not the party slain (6);"

(1) 4 Bl. Com. 200.

(2) Foster, 257.

(3) Ld. Ray. 1494.

(4) 2 Hale, 472.

(5) Ray. 140.

(6) 3 Inst. 57.

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and *Sir Matthew Hale* has confirmed this law, by adopting it in almost the same words (1). It is said in *Kelynge's Reports*, which are rendered more respectable from the great and noble hands through which the edition of them passed (2), that "If one man be trespassing upon another, "breaking his hedges, or the like, and the owner or his "servant shall upon sight thereof take an hedge-stake and "knock him on the head, it would be murder;" because it was a violent act beyond the proportion of the provocation. —*Sir William Blackstone* (3), combining the variety of cases upon this subject, draws this general conclusion from the whole of them: "If a man do such an act of which the "probable consequence may be, and eventually is, death, "such killing may be murder, although no stroke be struck "by himself, although no killing was precedently intended." —In the present case it has been proved, that the fact of killing was unlawful; that the stool was not such an instrument of correction as ought to be made use of against a child; and from her throwing it *at* the child, it must be inferred, that it was intended not only to hit, but to hurt her; and death has been the consequence. It was therefore an unlawful act, with an improper weapon, done with a mischievous intent, and death having ensued, it clearly comes within the cases I have cited, and proves the prisoner guilty of murder.

(1) 1 Hale, 475.

(2) Ld. Holt's Edit. p. 132.

(3) 4th Com. 197.

WILSON, *for the prisoner*.—The most material part of the verdict is that which the Counsel for the Crown has affected to think unnecessary, *viz.* that part which finds that the prisoner had no intention to kill the child. If, therefore, I shall be able to prove that where there is no intent there can be no murder, there will be no occasion to go into the rest of the case; but if I should fail in this attempt, much argument will arise upon the other facts of it.—The most simple idea of murder is that which attends a homicide committed from concealed motives of foul revenge. The most complex idea of it certainly arises where the intention to kill is combined with some other intention; as where persons assemble or the purpose of deer-stealing, with a determined resolu-

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tion to resist, to the utmost extreme, all who shall oppose them; for although the stealing the deer is the primary object, a secondary intent of killing whoever shall oppose them, is conceived to lurk in their minds. So where a father corrects his child, or a master his servant, with such a weapon as is likely to produce death, though the primary intent was only correction, yet the weapon being of a deadly nature, a secondary intention is implied, and on this implication, the killing in such case is adjudged to be murder. In all cases of this nature, where the intention is complicated, it will be uniformly found that the secondary intent to kill is the reason of the party being found guilty of murder. In *Plowden* (1) it is said, though the prisoner did not come with an intent to murder the deceased, but to kill another, the law will intend that he came with an intent to kill all who should resist him. In *Saville*, the park-keeper met with hunters coming to kill the deer; he warned them in a gentle manner to surrender themselves, but they refused, and one of them immediately drew his bow and pierced the unoffending park-keeper's son with an arrow, on which a battle ensued, and the park-keeper was killed; and on these circumstances the Court was of opinion, that the intent of the hunters must have been malicious, not merely against the game-keeper, but against all who should in any way oppose their illegal design: and in *Womal's Case* (2), the Court adjudged that the hunters were guilty of murder, though one of the park-keepers had first fired, because it appeared that the hunters had entered the park with an intent not only to commit an unlawful act, but to destroy those who should endeavour to prevent its being done; and on this secondary intent the Court implied the malice which constituted the crime.—But there must, however, not only be a secondary intent in the mind of the offender, but the killing must occur in the prosecution of an unlawful act. And in all the cases in which this rule prevails (3), the intent is not only to do an unlawful act, but to perpetrate every thing necessary to the accomplishment of it; that is, though the primary intent be not to kill, the secondary intent must be evidently to that extent.

(1) Plowd. 101.

Saville, p. 67.

(2) 2 Roll. Rep. 120.

(3) 1 Hale, 443. Foster, 351. Kely. 111. Plowd. 474.

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I shall next therefore take a view of those cases in which it is expressly decided, that where the intent is not to kill, the homicide cannot be murder. In *Turner's Case* (1), the prisoner had struck his boy with a clog because he had not cleaned them, and it was held to be only manslaughter (2), because the master could not, from the size of the instrument he made use of, have had any intention to take away the boy's life, for without this intent it cannot be murder. This case is precisely in point with the present case. The boy had neglected his business, so had the girl, and the provocation, though slight, was the same in each. The master struck him with an improper instrument, the clog, but it was intended to correct, and not to kill. The stool was not more improper than the clog, and correction was equally intended; but as the clog was not an instrument of such a nature as to be the probable cause of death, it was held to be only manslaughter, and surely it cannot be contended that the stool was more likely to take away the life of the girl than the clog was the life of the boy, and therefore the guilt cannot be greater in the one case than it was in the other. The cases respecting accessaries before the fact go a great way to contradict the idea that a killing may be murder, though there be no intent to kill; for in these cases, though there is clearly an intent to do mischief, though in some of them to the extent of killing, though not the person of the deceased, they have been held not guilty of murder (3)—as for instance, *Archer* advised *Saunders* to destroy the life of his wife by means of a poisoned apple; and giving her the apple accordingly, she eat part of it, and innocently gave the remainder to her daughter, who eat of it and died, although her mother recovered; and it was held by all the Judges that notwithstanding *Archer* was accessary to the malicious intent against the wife, he was not guilty of his child's death.—*Sir Matthew Hale* says (1), "If I command B. to beat C. with "a small wand or rod, which could not in all human pro- "bability cause death, and B. beat C. with a great club, or "wound him with a sword whereof he dies, it seems that I "am not accessary, though B. is guilty of murder." Now

(1) Ray. 142.

(2) 1 Ray. 144. 2 Raym. 1499.

(3) Plowd. 475.

(4) Hale, C. 436.

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in both these cases there was a clear intent in the accessary, yet in the first case, because his intent was not to kill the person who was killed, and because, in the second case, his intent was only to beat the person killed, the accessary was not guilty of murder. All the cases in which the homicide has been deemed murder, though the primary intent was not to kill, have been decided on this ground, that where a man intends to do an act, he intends all the probable consequences of it; but it cannot be conceived that in throwing the stool *at* the child the prisoner intended her death; for it was not a probable consequence, and the verdict expressly finds there was no such intent. There are indeed two cases mentioned by *Sir Edward Coke* (1) and by *Comberbatch* (2), where the intention of the probable consequences is not the ground on which the murder is determined; but these are cases that never in reality existed, and are only put by way of illustration when declaiming against the crime. Wherever it has been said that to constitute murder an intention to kill was not necessary, it only means that it is not necessary that the primary intent should be to kill, but it never could be intended to say, that no intent at all was necessary. In the present case there is not the appearance of any intention to kill, for every intent is an act of the mind, and can only be discovered externally by the fact which it occasions. Of these facts the Jury are to judge, and as they have declared that the intent of killing did not exist, the Court cannot infer that it did. Perhaps it may be said that the Jury only mean to find that the primary intent was not to kill, but the Jury have found that there was no intent of this kind at all, and the Court cannot alter the words which the Jury have used —If I have not satisfied the Court that an intent to kill is absolutely necessary to constitute the crime of murder, but they think that an intent to do a smaller mischief is sufficient, I must examine the other parts of the special verdict. The verdict has found that from *the size* and *the weight* of the stool it was *sufficient* to give a mortal blow; a fact that may be conceived to weigh very strongly against the prisoner; but I contend that this finding is unnecessary and immaterial; for

(1) 3 Inst.
(2) Comb. p. 409.

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the fact itself has shewn that it was capable of such a consequence. There is indeed nothing, however small, but may, from the principles of matter and motion, produce the like effect; for the increase of velocity may be in proportion to the decrease of size: this part of the verdict therefore can have no unfavourable effect. If indeed the finding had been that the stool was of such a size and weight as was *likely* to give a mortal blow, it would have carried a very different meaning; but the words of the verdict cannot be changed, or a construction given to them different from what in fair construction they import. It does not find that the prisoner took up the stool; and where the Jury do not positively assert a fact, I have a right to presume that the fact did not exist, and may therefore suppose that she had the stool in her hand at the time the girl's negligence first caught her attention, and that she threw it immediately from her hand: considering this act as the effect of a momentary passion, this circumstance will make a material difference in the complexion of the case; for then the act, from which such an unfortunate consequence ensued, will appear to have proceeded from a natural infirmity; from the influence of which no human being, however good, was ever yet known to be entirely free. —The verdict does not find that the stool was thrown *with violence*, and therefore I may presume that fate, rather than force, produced the event.—It does not find that the fact was done *in the house*; and therefore I may suppose it done in the field.—The distance at which the prisoner stood from the child is not found; and I may therefore presume that she stood at such a distance, as to make it barely possible for the stool to reach her. The cases produced by MR. PARTRIDGE go to prove that there must be an *intent to hit* with such an instrument as would probably produce death, and as the stool was thrown AT the child, he concludes that it was *intended to hit* her; but the correctness of this conclusion depends upon the construction of the word AT, which it is very well known is sometimes used to mean "*towards*." By the case of Rex v. Onely (1) it appears the word AT is derived from the Latin word *Erga*; and if this be its true etymology, (2) it cannot be

(1) Ld. Ray. 1486.

(2) Qu. if it is not derived from *ad*.

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taken that the verdict finds an intention to *hit* the deceased with it, but rather that she threw it *towards* the child that she might sit upon it and do her work over again. But be this as it may, to constitute murder the instrument must be such an instrument as was likely to occasion death, and the verdict does not find the stool to be an instrument of that description. Put then these circumstances into the form of a sentence, and it will stand thus:—The prisoner being in the field, with a stool in her hand, on which the deceased was always used to sit to do her work, and at some distance from the girl, and finding that she had knotted some of the skains she had given her to reel, threw the stool towards her, meaning thereby that she should take it home to sit upon, and go do the work over again.—This is by no means repugnant to the finding of the verdict; and if under the circumstances described by this sentence, the stool has happened to hit the child, and death resulted from the blow, can it be said that the prisoner is guilty of murder? In the cases most relied on by the Counsel on the part of the prosecution, the correction was given with an unlawful instrument; and in *Keate's Case* (1), where the master fetched his sword to correct the insolence of his servant, and death ensued from such an instrument, it was deemed murder, because a sword is an improper instrument for such a purpose. In the present case it does not appear that any correction was intended; the verdict does not find that the prisoner meant to correct the child; and if the stool was thrown in play, the homicide then surely cannot be construed murder. Suppose one of several persons playing at cricket throw the ball, which is much more likely to give a mortal blow than a small stool, at another, and the ball by accidentally hitting him in a mortal part occasion his death, could it be thought that the man who threw the ball merely in play, would be deemed guilty of so atrocious a crime as murder? There was a late case upon the assizes before MR. JUSTICE NARES (*a*), where a

(1) Ld. Ray. 140.

(*a*) This was the Case of the King against Wiggs. At the Summer Assizes for the County of *Norfolk*, 1784, the prisoner was tried before MR. JUSTICE NARES, upon an indictment for murder. It appeared upon the

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shepherd boy had suffered some of the sheep he was tending to escape through the hurdles; and his master, irritated by his negligence, took up a stake that was lying on the ground, and threw it at the boy, which hit him on the head and fractured his skull, of which he died, and the learned Judge directed the Jury, that unless they thought this stake, thus suddenly caught up, was an improper instrument, and used by the prisoner with intent to kill, the crime could only amount to manslaughter, and of that degree the Jury found it. There is between the present case, and the cases that have been cited on the other side, this striking difference, that in all those cases the weapon was held in the hand of the prisoner, and could not have been intended to have been used for any other purpose than to kill; but in the present case, the instrument was thrown, and therefore there was

evidence, that the prisoner was a butcher, and that he had employed the deceased, a shepherd boy, to tend some sheep that were penned. The deceased negligently suffered some of the sheep to escape through the hurdles. The prisoner seeing the sheep get through, ran toward the boy, and taking up a stake that was lying on the ground, he threw it at him. The stake hit the boy on the head, and fractured his skull; of which fracture he soon afterwards died. MR. JUSTICE NARES.—Gentlemen of the Jury, you will consider whether the negligence of the deceased was sufficient to excite the provocation of the master; for the humanity of the law so far respects the infirmities of nature, as not to arrange a homicide resulting from the transports of a passion excited by reasonable provocation, under the description of murder. It will in this case be manslaughter only.—Every master has a right moderately to chastise his servant, but the chastisement must be on just grounds, and with an instrument properly adapted to the purposes of correction. You will therefore consider whether the stake which has thus untimely deprived the boy of existence, and which lying on the ground was the first thing the prisoner saw in the heat of his passion, is, or is not, under such circumstances, and in such a situation, an improper instrument. For the using a weapon from which death is likely to ensue, imports a mischievous disposition, and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore if you should think the stake was an improper instrument, you will further consider whether it is probable that it was used with an intent to kill. If you think it was, you must find the prisoner Guilty of Murder. But on the contrary, if you are persuaded that it was not done with an intent to kill, the crime will then amount at most to manslaughter. The Jury found it manslaughter.

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less probability of its doing hurt: in those cases the only chance of not killing was, the wound inflicted not proving mortal; but in this case the chance was, that the instrument might not hit the girl, and if it did, that the wound might not be mortal.—These observations are calculated to shew that the prisoner is only guilty of manslaughter; but I shall now shew that she is not guilty at all, and ought to be discharged. FIRST, The wound found by the special verdict does not correspond with the wound laid in the indictment; for the indictment states that by beating, kicking, and throwing a stool at the girl, the prisoner bruised her in several parts of her body, &c.—but the special verdict finds that the stool hit her on the head; and as the blow given by the stool might, from the manner it is charged in the indictment, have been in some other part than the head, the verdict does not precisely find that the mode of killing charged in the indictment was the occasion of her death.—SECONDLY, There is no place found where the fact happened; and this is a fatal objection; for if facts were found that were necessary to support the indictment, yet if they are found to have happened in a different county from those in which they are laid in the indictment, the prisoner must be discharged, for it is necessary that a special verdict should agree with the indictment in every particular. THIRDLY, The verdict finds that the prisoner threw the stool, &c. &c. that the girl sat upon the stool; that after some time she fell upon the ground, and by *that* blow so given she died; but the word *that* does not particularize which blow she died of; for she must have received a blow from the falling off the stool, and that may be the blow referred to by the word *that*, and not the blow given by the stool; and taking the sense according to the strict rule of grammatical construction, it must mean the blow she received on falling from the stool, for the relative always refers to the antecedent next before it. The Jury by the word *that* undoubtedly meant the blow received from the stool, but the consideration is not what the Jury meant, but what they have said. Suppose a man at the top of a ladder, and another at the bottom give it so violent a blow that the

N. B. The Court overruled this objection during the argument.

man by the agitation of the ladder falls off, and dashes out his brains against the pavement, it would not appear by a finding that he was killed by *that* blow, what blow was meant, for he was certainly killed by the blow he received in his fall, though the blow given to the ladder was the cause of it. The Jury should have found the fact in this form, "by that "blow so given by the said stool so thrown;" for in every indictment for murder, except in the case of poisoning, there must be a *percussit*, and as it must be laid in the indictment, it must also be found by the special verdict. These may seem to be very nice distinctions, but in cases of life and death, I am warranted in making them by the authority of a case in *Kelynge* (1). *Glover* and others, deer-stealers, were indicted for shooting an officer; the gun was fired off among a number of persons who attacked the deer-stealers, in the dark, and the verdict not finding that the gun was discharged *at* any of them, the Court said, that it did not appear by the special verdict that *Glover*, or whoever fired the gun, discharged it *at* any of the King's officers; that it might have been for something else, and that though the Jury might have well found it, yet as they had not, the Court were confined to what they had found positively, and we are not to judge the law upon *evidence* of a fact, but upon the fact as it is found. In the principal case, therefore, as it is not found that the prisoner had any preconceived malice, or that she intended to correct the deceased; or that the stool was so thrown as probably to hit; nor that it was by hitting likely to kill; the verdict is insufficient to support the inference of guilt; and the prisoner is intitled to be discharged.

(1) Kely. p. 111.

PARTRIDGE, in reply.—The cases written by *Sir Edward Coke*, which it is said are only put by way of illustration, and in declaiming against the crime of murder, have received the approbation both of *Kelynge* and *Sir Michael Foster*. The case that is said to have been tried before MR. JUSTICE NARES is not reported, and being only at the assizes, not much to be relied on, but at any rate it goes to prove the prisoner guilty of manslaughter. In *Turner's Case* the instrument was so small, that it never could be thought likely to give a

1785. mortal blow. If it be not necessary that there should be a malicious intent, the murder is clear; and if it be necessary, then the Jury have found that the stool from its size and weight was sufficient to kill. By the word *at* the Jury only mean that the prisoner threw it with an intention to hit the child, and it being a deadly instrument it will constitute murder. As to the idea that the catastrophe arose from a sudden gust of passion, it may be answered, that the weapon was a deadly one; and if in the transports of unfounded rage a man will gratify his emotions to the dangerous extent of using such a weapon as is likely to occasion death, he must be answerable for the fatal consequences of his misconduct. It has been said, that *the distance* from which the stool was thrown is not found; but the fact proves that it was thrown from a distance near enough to kill. The argument that the blow, as found in the special verdict, must refer to that received by the falling off the stool is certainly ingenious, but the Court will not inspect the verdict with the eyes of philologists, but with the common understandings of men, and to such a view it is admitted that the verdict will be found to mean that the blow was given by the stool.—With regard to *the county* in which the fact happened not being found by the special verdict, I shall submit to the Court whether the indictment having been found by the Grand Jury, and the verdict by the Petty Jury, of *Burton*, and the fact itself having been found in the same place, are not sufficient to specify the county in which the verdict finds the fact.

HAZEL'S CASE.

BULLER, *Justice.* If all the facts be found, and all those facts be true, yet if they are found in another county than that in which they are laid in the indictment, judgment cannot be given, and therefore to enable the Court to give judgment, the verdict should find the facts in the same county as is laid in the indictment.

PARTRIDGE then moved for leave to amend the special verdict.

BULLER, *Justice.* You cannot amend a special verdict in capital cases (1).

(1) Ld. Ray. 141.

1785.

HAZEL'S CASE.

LORD MANSFIELD. If there be minutes to amend a special verdict by, it may be amended even in capital cases (1).—It is necessary that the criminal law should be certain; and it is almost as bad to let a crime go unpunished, as to permit an innocent man to suffer. Murder is where a man of sound sense unlawfully killeth another of malice aforethought, either express or implied. If the malice be express, the facts remain with the Jury. If the malice is to arise from implication, it is a matter of law, the entire consideration of which resides with the Court; and in the present case the finding that there was no intent to kill, does not in any degree vary the question.—But great matter of doubt having arisen from the wording of the special verdict, I wish the judgment to stand over till next term, in order to consult the Judges.

(1) In this Case the minutes were consulted, but they were found to have been exactly copied.

IN Trinity term 1785, PARTRIDGE moved to set it down again for a second argument, but the Court made no rule. It was however, for the difficulty of it, referred to the consideration of all the Judges.

BUT THE JUDGES never communicated any opinion upon this case; but after the prisoner had been confined for the space of twelve months, she received the King's pardon, and was discharged.

THE KING *against* THOMAS FIELD.

CASE CLXXX.

OLD BAILEY May Session 1785. This was a case reserved by Mr. SERJEANT ADAIR, Recorder, for the opinion of the TWELVE JUDGES.

Quære? Whether a person who takes some of the stamps from a writ, and fixes them to another writ of the same kind, and then sells it for the purpose of its being *used* by such persons as might buy it from his vendee, is within the 12 Geo. III. c. 48. Vide 2 East, 390.

THE Legislature, by the statutes cited in the margin, has imposed five sixpenny stamp duties upon every piece of parchment or paper upon which any original writ (except such original on which a writ of *capias* issues) *subpœna*, *bill of Middlesex*, *latitat*, *&c.* that shall issue out of, or pass the seals of any Court, holding plea of forty shillings.

1785. FIELD'S CASE.

By the statute 12 Geo. III. c. 48. "If any person or "persons shall write or ingross, or cause to be written or "ingrossed, either the whole or any part of any writ, &c. "in respect whereof any duty is or shall be made payable in "that behalf, or the whole or any part of any piece of parch- "ment or paper whereon there shall have been before writ- "ten any other writ, &c. in respect whereof any duty is or "shall be payable as aforesaid, before such parchment or "paper shall have been again marked or stamped according "to the said Acts:—OR shall fraudulently erase or scrape out, "or cause to be erased or scraped out, the name or names "of any person or persons, or any sum, date, or other thing "written in such writ, &c. as aforesaid:—OR *fraudulently* "*cut, tear, or get off, any mark or stamp, in respect whereof,* "*or whereby, any duties are or shall be payable, or denoted* "*to be paid or payable as aforesaid, from any piece of parch-* "*ment or paper, with intent to use such stamp or mark for any* "*other matter, writing, or thing, in respect whereof any such* "*duty is, or shall be payable, or denoted to be paid or pay-* "*able as aforesaid;* every person so offending in any of the "particulars before-mentioned, and every person knowingly "and wilfully aiding, abetting, or assisting any person to "commit any such offence, shall be guilty of felony, and be "transported for seven years."

On these statutes the prisoner was indicted, for that he having in his possession a *bill of Middlesex*, on which there was a certain stamp, denoting that the duty of sixpence (1), sixpence (2), sixpence (3), and sixpence (4), had been duly paid, did fraudulently and feloniously take off the said stamps, with intent to use them on another *bill of Middlesex*, the duties on the same being then due and owing to the King.

(1) 5 Will. III. c. 21.
(2) 9 & 10 Will. III. c. 25.
(3) 12 Geo. I. c. 33.
(4) 32 Geo. II. c. 35. and by 23. Geo. III. c. 58. which imposes another duty of sixpence, and 27 Geo. III. c. 13. s. 46. any fraudulent using of a legal stamp is made a capital offence.

There was a second count, charging him with having transposed the stamps from one *writ of latitat* to another; and both counts laid the offence to have been committed with intent to defraud the King.

It appeared in evidence, that there are two dies kept at the Stamp-Office, for the purpose of stamping *bills of Mid-*

dlesex and *latitats;* the one denoting the four sixpenny duties imposed by the statutes mentioned in the margin; the other denoting an additional sixpenny duty imposed by the statute 23 Geo. III. c. 58. and that since the passing of this last Act, all *bills of Middlesex*, and *latitats*, which have been stamped at the Stamp-Office, have been impressed with both the dies denoting the payment of the five sixpenny duties. 1785. FIELD'S CASE.

THE prisoner, a bailiff's follower, had served one *Samuel Higgins* with a copy of a *bill of Middlesex*, and had afterwards sold to one *Fryer*, a law-stationer, two blank *bills of Middlesex*, and one blank *latitat*, to which were affixed two stamps, one denoting that four sixpenny duties had been paid, and another denoting that one sixpenny duty had been paid; and it was positively sworn that these two stamps had been transposed from other writs of the same kind. Several old writs, and among them the *bill of Middlesex* with the copy of which he had served *Higgins*, with the stamps taken off, were found in his lodgings; but no proof could be given that the stamps which were taken from these writs had been legally stamped at the Stamp-Office.

UPON these facts, the Counsel for the prisoner submitted the following points to the Court.

FIRST, The indictment charges the prisoner with having in his custody a *process* of our Lord the King, &c. which appeared to have been before then *duly issued* against *Samuel Higgins* and *Richard Roe;* and such a writ is indeed produced; but it has not been proved that any such writ was ever legally stamped at the Stamp-Office, or that it *duly issued;* and it is called a *process*, a term of which no mention whatever is made in the Act of Parliament on which the indictment is founded.

SECONDLY, The indictment charges the prisoner with having taken off a stamp denoting that *four sixpenny* duties had been paid, *with intent* to affix them to another writ, for the purpose of defrauding the King; but the evidence is, that he took off *five sixpenny stamps:* and as it appears that there must be the *five stamps* to effect the fraud, the offence in the

1785. Act of Parliament is not described by the charge in the indictment, that he transposed four sixpenny stamps only.

FIELD'S CASE.

THIRDLY, The only evidence to affect the prisoner is his selling the writs to Mr. *Fryer*; but the statute is silent as to uttering, vending, or exposing to sale: and in so penal a case as this, it would violate all the known rules of construction to say, that this *sale* was made with an *intent to use* the stamp in the manner which the Act describes.

THESE objections were answered by the Counsel for the Crown; and the learned Judge left it with the Jury to consider, *First*, Whether the *bill of Middlesex* against *Higgins* was ever legally stamped? *Secondly*, If it was, whether the prisoner ever took off that stamp? *Thirdly*, If he did, whether he took it off with intention to use it on a *bill of Middlesex* or a *latitat*? And *fourthly*, If they thought the prisoner guilty, whether he took the stamp off and sold it with intention that it should be used by himself or others, for the purposes stated in the indictment?

THE Jury found the prisoner guilty; that "he took off the stamp from the *bill of Middlesex* mentioned in the indictment, and affixed it to a piece of parchment, purporting to be another process of the same kind, which he sold with others to *Fryer*, with intent that the same should be used by such persons as should purchase the same, but not with intent of using it himself."

ON this verdict the judgment was arrested; and the prisoner, after laying a long time in gaol, was at length discharged.

CASE CLXXXI. THE KING *against* LOCKHART.

A person who is discovered *(though by means of an improper confession)* to have purchased stolen property, is a competent witness to prove that fact. See 2 East, 658.

OLD BAILEY June Session 1785. The prisoner was indicted for stealing a number of diamonds and pearls, the property of *Ewen Bailey*, Esq. in the dwelling-house of *Narcissa Mascall*.

1785.

LOCKHART'S CASE.

THE prisoner had made a full confession of the fact, by which it was discovered that part of the property had been disposed of to a Mr. *Grant*; and the Counsel for the prosecution called Mr. *Grant* as a witness to prove that he had received the property from the prisoner.

BUT the confession having been obtained by such promises of favour as rendered it inadmissible evidence; it was contended, that as the discovery of Mr. *Grant* resulted from the illegal confession which had been obtained from the prisoner, he, Mr. *Grant*, was not a competent witness.

BUT the COURT said, that the law was clearly settled, that although a confession improperly obtained cannot be given in evidence, yet it can never go to the rejection of the evidence of other witnesses, which are got at in consequence of such a confession.

See the Case of Jane Warickshall, *ante* page 263, Case 131.

THE KING *against* RICHARDSON AND ANOTHER.

CASE CLXXXII.

AT the Old Bailey in June Session 1785, *Daniel Richardson* and *Samuel Greenow* were indicted before MR. JUSTICE BULLER for a highway robbery on *John Billings*.

If two men are indicted, and one of them appear to be innocent and the other guilty, but the prosecutor cannot identify them respectively, both must be acquitted.

IT appeared in evidence, that the two prisoners accosted the prosecutor as he was walking along the street, by asking him, in a peremptory manner, what money he had in his pocket? that upon his replying that he had only two-pence half-penny, one of the prisoners immediately said to the other, "If he really has no more do not take that," and turned as if with an intention to go away; but the other prisoner stopped the prosecutor, and robbed him of the two-pence half-penny, which was all the money he had about him. But the prosecutor could not ascertain which of them it was that had used this expression, nor which of them had taken the half-pence from his pocket.

THE COURT. The point of law goes to the acquittal of both the prisoners; for if two men assault another with intent to rob him, and one of them, before any demand of

1785.

RICHARDSON'S CASE.

money, or offer to take it be made, repent of what he is doing, and desist from the prosecution of such intent, he cannot be involved in the guilt of his companion who afterwards takes the money; for he changed his evil intention before the act, which completes the offence, was committed. That prisoner therefore, whichever of the two it was who thus desisted, cannot be guilty of the present charge; and the prosecutor cannot ascertain who it was that took the property. One of them is certainly guilty, but which of them personally does not appear. It is like the *Ipswich Case*, where five men were indicted for murder; and it appeared, on a special verdict, that it was murder in one, but not in the other four; but it did not appear which of the five had given the blow which caused the death, and the Court thereupon said, that as the man could not be clearly and positively ascertained, all of them must be discharged.

THE two prisoners were accordingly acquitted.

CASE CLXXXIII.

THE KING *against* GEORGE COOMBES.

If a loaded pistol be fired from the *land* at a distance of one hundred yards from *the sea*, and a man is maliciously killed in the water one hundred yards from the shore, the offender shall be tried by the *Admiralty Jurisdiction*; for the offence is committed where the death happens, and not at the place from whence the cause of the death proceeds. S. C. 1 East, 367.

AT the Admiralty Session held at the Old Bailey in the month of June 1785, *George Coombes*, who was indicted with *William Perrot*, *Jonathan Edwards*, *Edward Voss*, and three others, was found guilty on an indictment which charged, That they, on the 15th July 1784, with force and arms, upon the high sea, within the jurisdiction of the Admiralty of England, about the distance of half a mile from *Christ Church* harbour, in the county of *Southampton*, in and upon *William Allen*, feloniously, wilfully, and of their malice aforethought, did make an assault; and that the said *William Perrot*, a certain gun, charged with gunpowder and one leaden bullet, did discharge and shoot off against and upon him, the said *William Allen*, *&c.* thereby giving him, the said *William Allen*, one mortal wound, &c. upon the

high sea aforesaid, within the jurisdiction aforesaid, of which said mortal wound he, the said *William Allen*, afterwards died. AND that the said *Jonathan Edwards*, *George Coombes*, *&c.* at the time of committing the felony and murder aforesaid, then and there, upon the high sea aforesaid, within the jurisdiction aforesaid, feloniously, wilfully, and of their malice aforethought, were present, aiding, abetting, comforting, assisting, and maintaining the said *William Perrot* to kill and murder the said *William Allen* in manner and form aforesaid; and so the Jurors say, the said *Jonathan Edwards*, *George Coombes*, *&c.* then and there upon the high seas aforesaid, within the jurisdiction aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder the said *William Allen*.

1785.

COOMBES'S CASE.

See the statute 43 Geo. III. c. 113. s. 5. as to the trial of accessaries before the fact.

IT appeared in evidence, that the prisoners were supposed smugglers belonging to two luggers which lay in *Christ Church* harbour. The deceased was master of his Majesty's sloop *The Orestes*. On the afternoon of the 15th July 1784, *William Allen*, not being able to get into the harbour with *The Orestes*, manned his boat for the purpose of seizing the smuggling luggers, but in rowing into the harbour they struck upon a sand-bank opposite to the house of one *Sellon*. *Perrot*, *Coombes*, and the other prisoners quitted the luggers, ran on shore with loaded muskets in their hands, concealed themselves behind a wall near *Sellon's* house, and from thence fired at the King's boat, as they were pushing her from the sand-bank, by which firing *Allen*, who was on board the boat, was killed. The sand-bank was in the sea, about one hundred yards from the shore; and *Sellon's* house was about two hundred yards, or more, from the sea.

UPON this evidence the prisoner *Coombes* was found *Guilty*; but several points were raised in his favour, and it was the inclination of his Counsel to have a special verdict: but it was at length agreed to take a case; and the questions reserved were afterwards appointed to be argued before ALL THE JUDGES OF ENGLAND in the Exchequer Chamber.

THE Questions were, Whether, under the circumstances 1 Shower 369.

1785.

COOMBES'S CASE.

of this case, the prisoner had been properly tried by the Admiralty Jurisdiction? or, Whether he ought not to have been tried by the Common Law?

THIS case was argued by Counsel twice; first, on the 24th November 1785, in the Exchequer Chamber, and afterwards on the 20th January 1786, at Serjeants'-Inn, before all the JUDGES, except LORD LOUGHBOROUGH; and they were of opinion, that the prisoner was tried by a competent jurisdiction.

MR. JUSTICE WILLES delivered this opinion on the following day, at the Old Bailey, before SIR JAMES MARRIOT, Judge of the Admiralty Court, who pronounced sentence of death upon the prisoner; and he was executed pursuant to the sentence.

CASE CLXXXIV.

THE KING *against* AICKLES.

Old Bailey September Session 1785.

Qu. Whether a person who is convicted of a *single felony*, and receives judgment of transportation to *America*, but is pardoned on condition of transporting himself, and giving security so to do, can be convicted of *the capital felony*, or ought to be *remitted to his former sentence* on his breaking the *subsequent conditions* on which the pardon was granted?

JOHN HENRY AICKLES had been convicted in January Session 1784, of simple grand larceny; and in the July Session following, received judgment of transportation *to America*, for seven years: but in consequence of strong intercession in his favour, he afterwards received his Majesty's pardon, "on condition of transporting himself *beyond the* "*seas* for the same term of years, within fourteen days from "the day of his *discharge*, and of giving security to the "satisfaction of the RECORDER so to do (*a*)." He gave the

(*a*) One of the points made by MR. GARROW for the prisoner was, that the several statutes upon this subject would not authorize a conviction for a capital offence. By 6 Geo. I. c. 23. if any felon ordered to be transported to *America*, shall be afterwards at large within Great Britain without some lawful excuse, before his term is expired, he is guilty of a *capital offence*. By 16 Geo. II. c. 15. persons convicted of *single felonies*, and ordered to be transported to America, who shall have agreed on certain conditions to transport themselves to America, are also guilty of a *capital offence*, if they are afterwards illegally at large. By 8 Geo. III.

1785.

ACKLES'S CASE.

security required, and a warrant was accordingly issued by the RECORDER, directed to the Keeper of Newgate, authorizing his discharge; but as there were many civil detainers against him, his discharge was necessarily delayed until they were superseded. On the 26th May following, he was apprehended at *Islington*; and was now put to the bar on AN INDICTMENT for "returning from transportation, and being "found at large without *any lawful cause*, before the expira- "tion of the term of seven years, for which he was sen- "tenced to be transported."

The daily book of a public prison is good evidence to prove the time of a prisoner's discharge.

UNDER these circumstances it was held incumbent on the prosecutor to prove the precise day on which the prisoner was *discharged*; and for this purpose Mr. *Newman*, clerk of the papers of the prison, produced a daily book, which he kept, containing entries of the names of all the debtors and criminals who are brought into the prison, and the times when they are discharged: but it appeared that those entries were not made from Mr. *Newman*'s own knowledge of the facts, but that he generally made them from the information of the turnkeys, and frequently from the turnkeys' indorsements on the back of the warrants, which warrants were afterwards regularly filed.

Mr. Garrow.

IT was contended by the prisoner's Counsel, that these

c. 15. persons convicted of *capital offences*, who are afterwards pardoned on condition, and are thereupon ordered to be transported to America, are likewise guilty of a *capital offence*, if they are found at large. But when it became impracticable to send transports any longer to America, it was enacted by 19 Geo. III. c. 74. that persons convicted of *single felonies*, who were liable to be transported to America, and persons convicted of *capital offences* who had accepted a pardon on condition of transportation, may be sentenced to be transported to *any parts beyond the seas*; and that in every *such case*, all the statutes relating to transportation to America should be in full force and effect, as to the punishment for being at large before the expiration of the terms for which they were ordered to be transported, or had agreed to transport themselves to America, were expired; omitting the case of persons who had been convicted of single felony, and whose sentence of transportation to America had been pardoned, on condition to transport themselves generally *beyond the seas*.

1785.

AICKLES'S CASE.

were not original entries of the facts; and therefore that the turnkey himself by whom *Aickles* was discharged, or the original minute from which the entry of his discharge had been made, should be produced, because they alone were the best evidence upon this subject, and it was in the prosecutor's power to produce them. It was compared to the production of a tradesman's ledger in order to prove the delivery of goods, instead of producing the original memorandum or day-book from which the ledger had been posted; and it was argued, that no credit could be given to entries made entirely from hearsay and information, and therefore they ought not to be received as evidence.

Mr. J. Gould, Mr. B. Hotham, Mr. Recorder.

THE COURT, however, were clearly of opinion, That the contents of this book might be given in evidence. It is a book very different in its nature from the books or memorandums of a tradesman. It appears to have been the constant and long established practice of the keepers of a public prison to register the discharge of prisoners in such a book as the one produced, and in the manner which the witness has described. The Clerk of the Papers is a public officer in the prison; and the law reposes such a confidence in public officers, that it *presumes* they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence, and shall be taken to be *true*, under such a degree of caution as the nature and circumstances of each case may appear to require, except the *falsity* of them can be made to appear; for every presumption may be repelled by contrary evidence. In the present case, Mr. *Newman* has no private interest whatsoever in this book, to induce him to make factitious entries in it. He is a public officer recording a public transaction. Any person may undoubtedly falsify the entries if they can; but unless the truth of the entry as to the present fact can be impeached, it is admissible evidence (*a*).

(*a*) With respect to evidence, there is no difference between civil actions and criminal prosecutions. 2 Term Rep. 201.—Corporation books

1785.

AICKLES'S CASE.

THE entry was accordingly read; and it proved that the prisoner was discharged from Newgate, by virtue of MR. RECORDER'S warrant for that purpose, on the 14th March, 1785.

THE fact of the prisoner's having been found at large before the term of his transportation had expired being clearly proved, the question was, Whether he was at large *without lawful cause?* And it was submitted to the Court upon the authority of *The King* v. *Max. Miller* (1), and *Patrick Madan*'s Case (2), that having *literally* complied with the condition of the King's pardon, by giving security to the satisfaction of THE RECORDER to transport himself beyond the seas, and having in consequence thereof been legally discharged from Newgate by virtue of THE RECORDER'S warrant, that discharge was *a lawful cause* for his being at large, notwithstanding he had forfeited the recognizance of himself and his bail, by breaking the other part of the condition, in not transporting himself within *the fourteen days.*

(1) *Ante*, p. 74, Case 41.
(2) *Ante*, p. 223, Case 111.
See Cruise on Recoveries, p. 7.
2 Bl. Comm. 110.

GOULD, *Justice.* This is a case of high importance. Lord Coke says, that if a villain be manumitted, every condition annexed to such manumission is upon non-performance void. But the King may grant a pardon upon any condition he pleases, and the meaning of such a grant must be that if the condition be broken the pardon is null and void. By the old law where Benefit of Clergy did not interpose to save the life of the convict, if the offender had recourse to abjuration, and undertook to depart the realm with all possible speed, the want of due diligence to perform this undertaking, rendered him liable to be referred to his original sentence, as was done in *Stamper's Case;* and if his former sentence was capital he was ordered for execution; for, as

proved to have been regularly kept, though not kept by the proper officer, are evidence. 1 Strange, 93.—So are Herald's books, and minutes of a visitation. Strange, 192. So are the rolls of a Court Baron. Dougl. 572.—So whenever the original is of a *public nature*, a copy of it is good evidence. Cowp. 17. as of the register of christenings, marriages, burials, &c. though it appear that the register was made from a day-book. 2 Strange, 1073.—See Onslow's *Nisi Prius*, 236.

1785. AICKLES'S CASE.

the book says, there cannot be two attainders for the same crime. But when the new system of transportation commenced, the Legislature made returning before the expiration of the time *a new felony*, or, as subsequent statutes express it, "being found at large without lawful excuse, &c." This new system gave a new character to the law upon this subject, and if the returning convict came within this new description of offence, it was necessary to indict him for a new and distinct felony. The question therefore is, whether the Legislature has made the facts of this case a new felony. The 16 Geo. II. c. 15. enacts, that if any convict who shall agree to transport himself to *America*, shall be afterward found at large in Great Britain without lawful excuse, &c. he shall suffer death without benefit of clergy. This is the statute under which the prisoner is indicted. But the King has not modelled his pardon according to the terms of the statute; it is on condition of transporting himself beyond the seas, &c. This part of the condition he has neglected to perform, and as he has not complied with the terms upon which he was pardoned, it strikes me that he was found at large within the penalties of this statute. His discharge from prison was procured on a condition that he should go beyond the seas within fourteen days afterwards. It is true he procures that discharge legally by giving the required security, but he neglected to perform the condition upon which that security was taken. I therefore think that the instant the fourteen days expired, he was at large without lawful authority, for it is precisely like the case put by Lord Coke. He has certainly broke the condition and the pardon he obtained upon the terms of performing it is at an end.

HOTHAM, *Baron*. I am of opinion that the offence with which the prisoner is charged is not within the statute 16 Geo. II. c. 15. because he has not agreed to transport himself to *America* (*a*). And that he is not within 19 Geo. III.

(*a*) GOULD, *Justice*, in his argument on this Case said that it had been determined by all the Judges upon a question arising on the Fishing Act, referred by Mr. JUSTICE BATHURST, that where a statute says, that a convict shall be transported for seven years without saying to what place, it shall be understood to mean to *America*.

c. 74. because that Act relates only to those who have been *capitally convicted*. But as to the more doubtful question whether the non-performance of the condition has not completely rendered the whole pardon null and void; I think it ought to be reserved for future consideration. 1785. MICKLEY'S CASE.

ADAIR, *Recorder*. This offence does not appear to me to fall within that clause of the 16 Geo. II. c. 15. which relates to convicts who agree to transport themselves; nor within 19 Geo. III. c. 74. which relates to pardons granted by the King; for the prisoner did not agree to transport himself to *America*, and that clause in the 16 Geo. II. is not repealed by the 19 Geo. III. c. 74. His pardon is not a pardon for a capital offence, and the 19 Geo. III. c. 74. relates only to capital offences. It seems to me however that the indictment is perfectly supported under that clause of 16 Geo. II. c. 15. adopted by 19 Geo. III. c. 74. which makes it a capital felony to be found at large in Great Britain, within the term for which a convict who was liable to be transported to *America*, has received sentence to be transported *beyond the seas*. The prisoner was so sentenced; and has been found at large before the expiration of the time. So far the case seems to me to be clear; but it also appears that he was at large under a warrant from THE RECORDER, founded upon a conditional pardon granted by THE KING. Now I agree that when the King's pardon is broken, the pardon is void. This was the principle on which the court acted in the case of *Rex* v. *Madan* (1); which case is similar to the present case, excepting that he was not indicted for a new felony. On being put to the bar he confessed that he was the same person, and not being able to assign any lawful excuse for being at large, he was remanded to prison under his former sentence; for the condition of the King's pardon being broken, the pardon was gone, and the prisoner remained precisely in the same situation as he was before the pardon was granted. This is precisely the situation of the present prisoner.

(1) *Ante*, page 223, Case 111.

THE COURT differing in opinion upon this point, it was thought a proper question for the consideration of THE JUDGES, in case the Jury should find the prisoner guilty. But on

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AICKLES'S CASE.

farther evidence, it appeared that the prisoner had, at the time of his discharge, a real intention to quit the kingdom within the time, but that he had been prevented from carrying it into execution by the distress of poverty and ill health; and the Court being of opinion, That these impediments, if true, amounted to a *lawful excuse*, the Jury found a verdict, *Not Guilty* (*a*).

(*a*) At the Old Bailey September Session 1785, *George Thorpe* was indicted before ADAIR, *Recorder*, for returning from transportation. He had been convicted in the January Session preceding, and sentenced to transportation. On 25 March he received a pardon on condition of transporting himself, and, on giving the security it required, was discharged by the Recorder's warrant on the 9 April, but was found at large on 9 August following. It appeared that he had used various endeavours to procure a passage to America, but that he had been prevented from going by poverty and sickness. The Recorder thought that his having given security to perform the condition of the pardon, was a full and sufficient performance of the condition; and that his not leaving the kingdom was a forfeiture of the recognisance he and his bail had entered into; but that in Aickles's Case, which was exactly similar, the Court had differed with him in opinion upon this subject. He then left it with the Jury to consider whether his endeavours to transport himself having been prevented by poverty and ill health were a sufficient excuse: and he was acquitted.

CASE CLXXXV.

THE KING *against* BALLIE.

A person committed as a *rogue and vagabond* under the 23 Geo. III. c. 88. who breaks gaol, and on being committed as an *incorrigible rogue* under 17 Geo. II. c. 5. breaks gaol a second time, and then commits a new act of vagrancy as a *rogue and vagabond*, may be indicted for *felony*, and transported under the Vagrant Act.

OLD BAILEY September Session 1785. This was a case reserved by MR. SERJEANT ADAIR, Recorder, for the opinion of the TWELVE JUDGES.

THE prisoner had been apprehended on the statute 23 Geo. III. c. 88. by which it is enacted, "That if any person shall "be found in or upon any dwelling-house, warehouse, coach-"house, stable, or out-house; or in any inclosed yard, or "garden, or area, belonging to any house, with intent to "steal any goods or chattels, he shall be deemed A ROGUE "AND A VAGABOND, within the meaning of the statute of 17

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" Geo. II. c. 5. usually called *The Vagrant Act*;" and having been committed to the House of Correction till the then next ensuing Session, the Justices, on examination of the circumstances, had adjudged him to be A ROGUE AND A VAGABOND within the meaning of the Act; and ordered him to be detained in the House of Correction for six months, by virtue of 17 Geo. II. c. 5. s. 9. Before the six months had expired, the prisoner made his escape; but he was again apprehended, and, at an adjournment day of the same Session, he was committed by a warrant of two Justices, under the 4th section of the Vagrant Act, as an INCORRIGIBLE ROGUE, and ordered to be detained in the same House of Correction for two years. Before this term of imprisonment expired, he again broke gaol and was again apprehended, on another clause of the statute 23 Geo. III. c. 88. by which it is enacted, " That any person having upon him any picklock-key, crow, " jack, bit, or other implement, with an intent feloniously " to break and enter into any dwelling-house, ware-house, " coach-house, stable, or out-house; or shall have upon him " any pistol, hanger, cutlass, bludgeon, or other offensive " weapon, with intent feloniously to assault any person, shall " be deemed A ROGUE AND VAGABOND as aforesaid."

UNDER these circumstances, the prisoner was now indicted on the statute 17 Geo. II. c. 5. s. 9. by which it is enacted, that if any person committed as AN INCORRIGIBLE ROGUE shall break out or make his escape, or shall offend again *in like manner*, he shall be guilty of FELONY, and be transported for seven years.

THE indictment accordingly *stated*, that the prisoner had been committed by a Justice, and convicted by the Sessions, as A ROGUE AND VAGABOND under the 23 Geo. III. c. 68. and having been committed for six months had escaped, &c. THAT afterwards he had been convicted for that escape, and committed as AN INCORRIGIBLE ROGUE, and had again broke gaol before the expiration of the time, &c. And then it charged that the said *George Ballie*, on such a day, did offend again *in like manner* as A ROGUE AND VAGABOND, in having upon him a certain offensive weapon called a pistol, with intent

1785. feloniously to assault same person or persons, against the peace, &c.

BALLIE'S CASE.

THE records of his former convictions were produced, his identity, and the fact of his having the pistol for felonious purposes, were fully proved, and he was found *Guilty;* but the judgment was respited, and the case referred to the consideration of the JUDGES on the two following questions:

FIRST, Whether the offence for which the prisoner was convicted, being created by the statute 23 Geo. III. c. 88. could be maintained under an indictment on the statute of 17 Geo. II. c. 5.?

SECONDLY, Whether the words "shall offend again *in like* "*manner,*" in the statute of 17 Geo. II. c. 5. do not refer to such offences only as bring the offender under the description of AN INCORRIGIBLE ROGUE? and if so, Whether the present indictment is good in charging the prisoner with having offended *in like manner* as A ROGUE AND VAGABOND, instead of having offended *in like manner* as AN INCORRIGIBLE ROGUE?

MR. JUSTICE GOULD in February Session 1786, after stating the proceedings above mentioned, delivered the opinion of the JUDGES to the following effect:

THIS case was reserved by MR. RECORDER, upon two objections raised by the Counsel for the prisoner. On the first day of last Hilary Term, the JUDGES assembled to consider of this case; and they are unanimously of opinion, That there is no foundation in law for either of the objections.

As to the first objection,—The title of an Act of Parliament, although it is not considered as any part of the Act, yet it may serve to explain the intent and meaning of the Legislature; and the title of the 23 Geo. III. c. 88. is "An "Act to extend the provisions of an Act, &c. [setting out "the title of the 17 Geo. II. c. 5.] to cases not therein men-"tioned." It enacts, that every person under the circumstances in which the prisoner is described in the indictment to have been found, shall be deemed a rogue and vagabond within the meaning of the 17 Geo. II. c. 5. The JUDGES are therefore of opinion, That the 23 Geo. III. c. 88. is to have

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the same operation as if the offences described in it had been originally inserted in the Vagrant Act, in continuation of the offences therein described; and that it is in every respect to be considered as incorporated into, and making a part of, that Act.

As to the second objection,—The JUDGES, upon weighing the several provisions of the 17 Geo. II. c. 5. as far as they apply to the case of the prisoner, are of opinion, That the indictment is right both in form and substance. The statute divides the offences into three classes: *First*, IDLE AND DISORDERLY PERSONS, who, on conviction by one witness, before one Justice, may be committed to the House of Correction, not exceeding one month. *Secondly*, ROGUES AND VAGABONDS, who are to be examined by the Magistrate, and publicly whipped, or ordered to be sent to the House of Correction (1) till the next Session, or for any less time, as such Justice shall think proper. *Thirdly*, INCORRIGIBLE ROGUES, who it seems must be committed till the next Session, and cannot be punished by the Magistrate. It appears that the prisoner escaped from his commitment as a *rogue and vagabond*, upon which escape he immediately became an *incorrigible rogue;* and on being brought before the Session, he was so adjudged, and sentenced to be detained in the House of Correction for two years, and afterwards made his escape. These facts are introduced into the indictment; and it then goes on to state the offence which he had committed against the statute 23 Geo. III. c. 88. and concludes by averring in the words of the 17 Geo. II. c. 5. that he had "offended "again *in like manner*." The statute of 23 Geo. III. c. 88. declares, that the persons therein described shall be considered as rogues and vagabonds within the meaning of the 17 Geo. II. c. 5. It is enacted by the 17 Geo. II. c. 5. s. 4. "That all *rogues and vagabonds* who shall break or escape "out of any House of Correction before the expiration of "the term for which they were committed: and all persons "who, after having been punished as *rogues and vagabonds*, "and discharged, shall again commit *any of the said offences*, "shall be deemed *incorrigible rogues*." The Act then goes

(1) Or by 27 Geo. III. c. 11. to the common gaol.

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on in sect. 9. to authorize the Justices in Sessions to detain such *rogue and vagabond* in the House of Correction for any time not exceeding six months; and such *incorrigible rogue* for any time not less than six months, nor exceeding two years; and then follows the clause on which the present question arises: "And if such *incorrigible rogue*, so ordered by "the Sessions to be detained in the House of Correction, "shall break out or make his escape, *or* shall offend again in "like manner, he shall be guilty of felony, and be trans-"ported for seven years." The context of this clause of the Act which adopts the words "*in like manner*," refers to the next antecedent words, "*shall break out or make his escape*;" recourse therefore must be had to the other parts of the Act, to find out what the Legislature mean by these words: and the JUDGES are of opinion, That the words "*in like manner*" must necessarily refer to the offences described in the fourth section before mentioned. What then is the situation of the prisoner? He is committed to the House of Correction for six months as a *rogue and vagabond:* by breaking gaol he is guilty of a new act of vagrancy, and is adjudged and committed for two years as an *incorrigible rogue:* from this imprisonment he again makes his escape before the two years are expired, and commits another act of vagrancy as a *rogue and vagabond*, against the 23 Geo. III. c. 88. By this escape he becomes *an incorrigible rogue* a second time; and he afterwards offends again "*in like manner*" as a rogue and vagabond. All these facts are disclosed in the indictment. No technical terms or words of art are made necessary to the description of this offence. The law therefore must draw this inference from the words, *viz.* that by having offended again in like manner as a *rogue and vagabond*, he becomes *an incorrigible rogue* a second time, and thereby incurs the guilt of felony. It is therefore the unanimous opinion of the JUDGES, That the indictment is proper, and that the prisoner is in the predicament which the Legislature has said shall be punished with transportation.

HE was accordingly ordered to be transported for the term of seven years.

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THE KING *against* JAMES SCOTT AND OTHERS.

CASE CLXXXVI.

In a counter-plea of clergy it is not necessary to set out *the tenor* of the indictment on which the prisoner was convicted and received his clergy; nor can any defects in such indictment be taken advantage of on such plea.

AT the Old Bailey in October Session 1785, four prisoners of the names of *Isaac Votear*, *Thomas Deane*, *George Franklin*, and *James Scott*, were tried before MR. JUSTICE NARES, on the following indictment:

"THE Jurors for our Lord the King upon their oath pre- "sent, That *Isaac Votear*, late of *the Liberty of the Tower* "*of London*, in the county of *Middlesex*, labourer, and "*Thomas Deane*, late of the liberty aforesaid, in the county "aforesaid, labourer, after the twenty-fourth day of June, in "the year of our Lord 1771, TO WIT, on the twelfth day of "September, in the twenty-second year of George the "Third, with force and arms, at the parish aforesaid, within "the liberty aforesaid, in the county aforesaid, one piece of "copper money of this realm, called an Halfpenny, then "and there unlawfully and feloniously did make, coin, and "counterfeit, against the form of the statute in such case "made and provided, and against the peace of our said Lord "the King, his Crown and Dignity: AND THE JURORS "AFORESAID, upon their oath aforesaid, do further present, "that *George Franklin*, late of *the Liberty of the Tower of* "*London*, in the county of *Middlesex* aforesaid, labourer, "and *James Scott*, late of the same place, labourer, before "the said felony was committed in form aforesaid, TO WIT, "on the said twelfth day of September, in the twenty-second "year of George the Third, &c. with force and arms, at the "parish aforesaid, within the liberty aforesaid, in the county "aforesaid, did unlawfully and feloniously counsel, aid, abet, "and procure the said *Isaac Votear* and *Thomas Deane* to "do and commit the said felony in manner and form afore- "said, against the form of the statute in such case made and "provided, and against the King's peace, his crown and "dignity: AND THE JURORS AFORESAID, upon their oath "aforesaid, do further present, that the said *Isaac Votear* "and *Thomas Deane*, after the twenty-fourth day of June, "in the year of our Lord 1771, TO WIT, on the twelfth day

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" of September, in the twenty-second year aforesaid, with " force and arms, *at the parish aforesaid*, within the liberty " aforesaid, in the county aforesaid, one piece of false, " feigned, and counterfeit copper money, to the likeness and " similitude of the good, legal, and current copper money " of this realm called an Halfpenny, then and there unlaw- " fully and feloniously did make and coin, against the form " of the statute in such case made and provided, and against " the King's peace, his crown and dignity: AND THE JU- " RORS AFORESAID, upon their oath aforesaid, do further " present, that the said *George Franklin* and *James Scott*, in " form aforesaid, TO WIT, on the twelfth day of September, " in the twenty-second year aforesaid, did unlawfully and " feloniously counsel, aid, abet, and procure the said *Isaac* " *Votear* and *Thomas Deane* to do and commit the said last- " mentioned felony, in manner and form aforesaid, against " the form of the statute in such case made and provided, " and against the King's peace, his crown and dignity."

THE prisoners were all convicted upon this indictment; and, on receiving judgment, they prayed the *benefit of clergy*, which was allowed them accordingly; and each of them were sentenced to pay a fine of one shilling, and to suffer one year's imprisonment in Newgate.

ON the 13th of October 1785, *James Scott*, one of the four prisoners, was convicted, with two other persons, at the Old Bailey, on the same statute on which the former indictment had been founded, *viz.* 11 Geo. III. c. 40. for having counterfeited a farthing; and being asked what he had to say why judgment of death should not be passed upon him, he again prayed to be allowed the benefit of the statute.

BUT THE COUNSEL *for the Crown* filed A COUNTER-PLEA, stating that he was not intitled to the benefit of the statute in such case made and provided, because he the said *James Scott*, by the name and description of *James Scott*, late of *the Liberty of the Tower of London*, in the county of *Middlesex*, labourer, heretofore and before the said felony was committed, at the delivery of the King's gaol of *Newgate*, holden for

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SCOTT'S CASE.

the county of *Middlesex*, at Justice Hall in the Old Bailey, &c. on Wednesday, the sixteenth day of October, in the twenty-second year of George the Third, &c. "was tried "upon an indictment, for that one *Isaac Votear*, late of the "Liberty of the Tower of *London*, in the county of *Mid-* "*dlesex*, labourer, and *Thomas Deane*, late of the liberty "aforesaid, in the county aforesaid, labourer, after the twen- "ty-fourth day of June 1771, TO WIT, on the twelfth day of "September, in the twenty-second year of George the Third, "one piece of copper money of this realm, called an Half- "penny, unlawfully and feloniously did make, coin, and "counterfeit: AND FOR THAT the said *James Scott*, before "the said felony last-mentioned was committed in form afore- "said, TO WIT, on the twelfth day of September, in the "twenty-second year of George the Third, did unlawfully "and feloniously counsel, aid, abet, and procure the said *Isaac* "*Votear* and *Thomas Deane* to do and commit the said fe- "lony, in manner and form aforesaid, against the form of "the statute in such case made and provided, and against "the peace of our said Lord the King, his crown and dig- "nity: AND FURTHER, THAT the said *Isaac Votear* and "*Thomas Deane*, after the twenty-fourth day of June 1771, "TO WIT, on the twelfth day of September, in the twenty- "second year aforesaid, one piece of false, forged, and "counterfeit copper money, to the likeness and similitude of "the good, legal, and current copper money of this realm, "called an Halfpenny, unlawfully and feloniously did make "and coin: AND FURTHER, THAT the said *James Scott*, be- "fore the said last-mentioned felony was committed, TO WIT, "on the twelfth day of September, in the twenty-second "year aforesaid, within the liberty aforesaid, in the county "aforesaid, did unlawfully and feloniously counsel, aid, abet, "and procure the said *Isaac Votear* and *Thomas Deane* to "do and commit the said last-mentioned felony, in manner "and form aforesaid, against the form of the statute in such "case made and provided, and against the peace of our said "Lord the King, his crown and dignity."

THE counter-plea then proceeded to state, "That the said

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" *James Scott* was thereupon convicted, and prayed that the " benefit of the statute in such case made and provided " might be allowed to him the said *James Scott*, and the same " was allowed to him accordingly; and it was considered " and adjudged by the said Court last-mentioned, that the " said *James Scott* pay a fine of twelve-pence, and be impri- " soned in the said gaol of Newgate for the space of one " year; which the said THOMAS SHELTON is ready to verify " and prove *by the record* thereof; and that the said *James* " *Scott*, who stands convicted at the said delivery of the " King's gaol of Newgate now here holden at the said city " of *London*, is *the same person* who was convicted at the said " delivery of the said King's gaol of Newgate, holden for " the county of *Middlesex* at Justice Hall in the Old Bailey, " &c. on Wednesday, the sixteenth of October, in the twen- " ty-second year, &c. and not another and different person.— " WHEREFORE, since the said *James Scott* hath *already re-* " *ceived the benefit of the statute, and been admitted to his* " *clergy*, the said THOMAS SHELTON, for our said Lord the " King, prayeth judgment of the Court here, and that the " said *James Scott* may receive JUDGMENT *to die* according " to law."

To this COUNTER-PLEA the prisoner replied *nul tiel record*, and denied that he was *the person* named in the said plea; and the Crown joined issue on this replication.

THE Sheriff returned a Jury *instanter*; and they were sworn well and truly to try, whether the prisoner at the bar was convicted of the felony at the Old Bailey on Wednesday, the sixteenth of October 1782, and whether he is the same person that was then and there tried and convicted, and received the benefit of his clergy; the Court informing the prisoner that he had a right to challenge any of the Jurors before they were so sworn.

To prove that a *James Scott* had been convicted of the offence stated in the counter-plea at the Old Bailey, on Wednesday, the sixteenth of October 1782, the record of the first conviction was produced, which stated the several adjournments of the Session of the Peace at which the indictment

was found; the Justice before whom it was found; THE INDICTMENT itself *verbatim* as before stated; the process on the said indictment, with the trial and conviction of the several persons mentioned therein; that they severally prayed the benefit of the statute, which was allowed them, and judgment given against them respectively to be fined one shilling, and imprisoned one year in Newgate.

THE Counsel for the prisoner contended,

FIRST, That the counter-plea was insufficient, inasmuch as the indictment therein stated differed materially from the record of the indictment produced in evidence; and that THE TENOR of the indictment ought to have been correctly stated, the prisoner being intitled to take advantage of all *variances* between the plea and the record.

SECONDLY, That even if it were not necessary to set forth the whole of the indictment according to its TENOR, yet that enough should be stated to shew that the prisoner had been duly attainted of the former felony, which had not here been done, as no *place* was stated in the indictment, or set forth in the counter-plea, where the offence was committed, from whence *the venue* could appear; nor did it appear that the principal felons were convicted, without which *James Scott*, who was only charged as an *accessary*, could not have been duly convicted.

THE Jury, on *vivâ voce* testimony being produced of the fact, found the identity of the prisoner; and the case was saved for the opinion of the TWELVE JUDGES, whether the counter-plea was, in its present form, sufficient to oust the prisoner of his clergy.

THE JUDGES were of opinion, that the objections were not material upon the indictment to which the counter-plea was pleaded; that the defects in the original indictment are *matters of error* not to be taken advantage of on this counter-plea; and that there was no *material variance* between the copy of the indictment proved and that set forth in the counter-plea.

1785.

CASE CLXXXVII.

THE KING *against* JOHN HUGHES AND OTHERS.

There must be both a breaking and an entering to constitute burglary; and the *breaking* must be such as will afford the burglar an opportunity of *entering* so as to commit the intended felony.
S. C. 2 East, 491.

THIS was an indictment for BURGLARY with intent to steal, tried before MR. JUSTICE WILLES at the Old Bailey in December Session 1785.

IT appeared in evidence, that the prisoner had bored a hole, with an instrument called a *centre-bit*, through the pannel of the house-door, near to one of the bolts by which it was fastened, and that some pieces of the broken pannel were found withinside the threshold of the door; but it did not appear that any instrument, except the point of the *centre-bit*, or that any part of the prisoners' bodies had been withinside the house, or that the aperture made was in fact large enough to admit a man's hand.

THE COURT was clearly of opinion, That this was a sufficient *breaking*; but the doubt was, Whether it could possibly be construed such an *entry* as the law requires to constitute the crime of burglary? The point was argued by Counsel to this effect:

FOR THE PRISONER.—Whatever notions may have prevailed upon this subject in times of high antiquity, it has been long established in theory, and confirmed by the uniform practice of ages, that there must be both a *breaking* and an *entering* to constitute the crime of burglary. They are distinct and separate acts; and "the words *fregit et intravit*," says LORD HALE, "are indispensably necessary "to an indictment for this offence; for breaking without entering, or entering without breaking, makes not burglary (1)." But the question in the present case is, Whether these acts can be said to be complete, unless they are carried into such a degree of effect, as will afford to the burglar an opportunity of committing the premeditated felony? In burglary, there must be a *breaking in fact*; for a mere breaking in construction of law is not sufficient (2); and until the passing of the 12 Ann. c. 7. an *actual entry* into the house, subsequent to and by means of the breaking,

(1) 1 Hale, 550. 1 Hawk. P. C. 160. See also an illustration of this position by Sir E. Coke, 3 Inst. 80.

(2) 1 Hale, 552. Dalt. 487. Kely. 67, 70.

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HUGHES'S CASE.

was also required. There are, however, some cases upon this subject, in which it must be acknowledged, that from an anxiety to preserve domestic security sacred and inviolate during the hours of night, the ancient principles of the common law respecting burglary, have been construed with a latitude not usual in questions of life or death; and it has been held, that the smallest degree of *entry* whatever is sufficient to satisfy the law. Putting a hand, or a foot, or a pistol, over the threshold of the door, or a hook or other instrument through the broken pane of a window (1), have been decided to be burglarious entries; but the principle of all these new determinations is, that there has been such a previous breaking of the castle of the proprietor, as to render his property insecure, by affording to the burglar an opportunity to commit the projected felony, of whatsoever kind or description that felony may be. By the introduction of such effective members of the body as the hand or the foot, it is clear that there must be an opportunity afforded of taking out property, and therefore such entries are held sufficient. By the introduction of a pistol, terror is applied to the true man, and the property is taken by means of fear. And in those cases where an instrument has formed any part of the question, it has always been taken to mean, not the instrument by which the breaking was made, but the instrument, as a hook, a fork, or other thing by which the property was capable of being removed, introduced subsequent to the act of *breaking*, and after that essential preliminary had been fully completed. Suppose the brick wall of a house to be broken with a pickaxe, and that part of the pickaxe had in the violence of breaking been withinside of the house, could this have been held an *entry* to steal? In the present case, the introduction of the instrument is part of the act of breaking, but it is impossible to conceive that it was introduced for the purpose of purloining property, for it is incapable of performing such an office. It was used for the purpose of breaking into the *domicile* of the proprietor; and if the breaking it effected had enabled the prisoners by any possible means to have taken goods through the aper-

(1) So determined in Hilary Term, 26 Eliz. 1 And. 115. See also Lambard, Cap. 7. page 263.

1 Hale, 439, 555. Sum. 80. Kely. 111. Foster, 350, 353. 1 Hawk. 161.

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HUGHES'S CASE.

ture, that branch of the offence would most certainly have been complete; but as no property has been proved to lie near the hole, so as to be removed by means of a hand, hook, or other instrument, the degree of breaking itself seems insufficient. The cases that have been mentioned of entries by a hand, or a foot, or a pistol, all proceed on the idea that the breaking had been previously completed, and are considered as acts of dominion, acquired by the breaking, over the property of the owner; but there is not a case which has yet gone the length of determining, that the introduction of an instrument in the act of breaking shall satisfy the two acts which the law requires, *viz.* a *breaking* to obtain dominion over the property, and an *entry* to steal it.

THE prisoners were acquitted of the felony; but they were detained and convicted at Hicks's Hall of the misdemeanor.

1786.

CASE CLXXXVIII.

JOHN RUSTON'S CASE.

A witness, though *deaf* and *dumb*, may be sworn and give evidence on an indictment for felony, if intelligence can be conveyed to, and received from him by means of signs and tokens.

See the case of Eliz. Steele, *post*, Old Bailey May Sess. 1787.

AT the Old Bailey January Session 1786, on the trial of *William Bartlet* for simple grand larceny, *John Ruston*, a man *mutus et surdus à nativitate*, was produced as a witness on the part of the Crown.

MARTHA RUSTON, his sister, being examined on the *voir dire*, it appeared that she and her brother had been for a series of years enabled to understand each other by means of certain arbitrary signs and motions, which time and necessity had invented between them. She acknowledged that these signs and motions were not significant of letters, syllables, words, or sentences, but were expressive of general propositions, and intire conceptions of the mind; and that the subjects of their conversation had in general been confined to the domestic concerns and familiar occurrences of life. She believed, however, that her brother had a perfect knowledge of the tenets of Christianity, and was certain

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RUSTON'S CASE.

that she could communicate to him true notions of the moral and religious nature of an oath, and of the temporal dangers of perjury.

IT was objected by the prisoner's Counsel, that although these modes of conveying intelligence might be capable of impressing the mind with some simple ideas of the existence of a God, and of a future state of rewards and punishments, yet they were utterly incapable of communicating any perfect notions of the vast and complicated system of the Christian religion; and therefore the witness could not with propriety be sworn upon the Holy Gospels (1). The difficulty of arraigning a man for perjury whom the law presumes to be an idiot, and who is consequently incapable of being instructed in the nature of the proceedings against him, was also urged against the admissibility of the witness.

(1) See 3 Atk. 50. the Case of Rex *v.* Taylor, Mr. Peakes, *nisi prius* 11; and Rex *v.* Gilham, Espinasse, N. P. 285.

BUT THE COURT over-ruled the objection; and *John Ruston* was sworn to depose "the truth," &c. and *Martha Ruston* "well and truly to interpret to *John Ruston*, a witness "here produced in behalf of the King against *William* "*Bartlet*, now a prisoner at the bar, the questions and de- "mands made by the Court to the said *John Ruston*, and "his answers made to them." Mr. J. Heath.

THE prisoner was found *Guilty*, and received sentence of transportation for seven years.

CASE CLXXXIX.

THE KING *against* GEORGE CHARLEWOOD.

AT the Old Bailey in February Session 1786, *George Charlewood* was indicted before MR. JUSTICE GOULD, present MR. BARON PERRYN, for feloniously stealing, on the 4th day of October 1785, a bay gelding, price five pounds, the property of *John Houseman*.

THE prosecutor was a livery-stable keeper in *Crown-street*,

To constitute *larceny*, the felonious intention must exist in the mind *at the time* the property is obtained; for if it be obtained by *fair contract*, and afterwards *fraudulently* converted, it is no *felony*. If, however, a *fraudulent conversion* take place after the *privity of contract* is determined, it is *felony*.—S. C. 2 East, 689.

1786.

CHARLEWOOD'S CASE.

St. Ann's, Soho. On the 4th October 1785, the prisoner, who was a post-boy, applied to him for a horse in the name of a Mr. *Eley*, saying, that there was a chaise going to *Barnet*, and that Mr. *Eley* wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. The gelding described in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse, and on going out of the stable-yard he met a friend of his, who asked him, where he was going? to which he replied, that he was going no further than *Barnet*. He accordingly proceeded towards *Tottenham-court-road*, which leads to *Barnet*, and also, though in some degree circuitously, to Mr. *Eley*'s house. This transaction took place about nine o'clock in the morning, and between three and four o'clock in the afternoon of the same day the prisoner sold the gelding to one *Robert Sugden*, at the *Black Horse*, in *Leman-street, Goodman's Fields*. The knees of the horse were terribly broke, one of them running blood, and the horse appeared to have been ridden very hard. The price for which the prisoner sold the horse, with the bridle and saddle included, was one guinea and a half: the purchaser almost immediately afterwards sold them to one *Johnston* for two pounds fifteen shillings.

THE COURT *to the Jury.*—THE JUDGES, in the case of one *Pears* (1), under circumstances similar to the present, have determined, that if the Jury be satisfied by the facts proved, that a person, at the time he obtains a horse, means to convert it to his own use, it is felony. But between the law of that case and the present, there is a distinction so nice, that it may seem to common understandings like splitting a hair. As this distinction, however, is adopted by the law, it is my duty to state it to you. If therefore you should think that the prisoner, at the time he came to hire the horse for the purpose of going to *Barnet*, really intended to go to *Barnet*, and proceeded, as it appears by the evidence he did, on his way to that place, it will certainly not be a felonious taking; for to constitute this species of felony, you must look to his intention at the very moment when he obtained the gelding: and therefore if he really intended to go to *Barnet*, but find-

(1) *Ante*, p. 212, Case 105.

13 Edw. IV. pl. 9. Fulton, 129.

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ing himself in possession of the horse, afterwards hatched the idea of converting it to his own use instead of proceeding to the place to which the horse was hired to go, it will not amount to a felonious taking (*a*). There is, however, another point for your consideration; for although he really went to *Barnet*, yet he was obliged by the contract to deliver the gelding to the owner upon his return to *London*; and therefore, if you think that he performed the journey, and returned to *London*, and instead of delivering the gelding to the owner converted it, after such return, to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would be then over.

THE JURY found the prisoner *Guilty* upon the first point —That at the time he hired the horse he had an intention to steal it; and this finding bringing the case precisely within

(*a*) Elizabeth Leigh was indicted at Wells Assizes in the Summer of 1800, for stealing various articles, the property of *Abraham Dyer*. It appeared that the prosecutor's house, consisting of a shop containing muslin and other articles mentioned in the indictment, was on fire; and that his neighbours had in general assisted at the time in removing his goods and stock for their security. The prisoner probably had removed all the articles which she was charged with having stolen, when the prosecutor's other neighbours were thus employed; and it appeared, that she removed some of the muslin in the presence of the prosecutor and under his observation, though not by his desire. Upon the prosecutor applying to her the next morning, she denied that she had any of the things belonging to him; whereupon he obtained a search-warrant and found his property in her house; most of the articles artfully concealed in various ways. But it was suggested that she originally took the articles with an honest purpose, as her neighbours had done, and that she would not otherwise have taken some of them in the presence, and under the view, of the prosecutor; and that therefore the case did not amount to felony. The Jury, from the observations they received from the Court, found her Guilty; but said, that in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And upon a reference to the JUDGES in Michaelmas Term 1800, all (absent LAWRENCE, J.) held the conviction wrong; for that if the original taking were not with intention to steal, the subsequent conversion was no felony, but a breach of trust.

1786. the reason of the determination in the case of *The King* v. *Pears*, the Court thought the point too clear to save the case, and the prisoner received sentence accordingly.

CASE CXC.

DAVID MILDRONE'S CASE.

A Scotch covenanter may give evidence in a criminal prosecution, on being sworn according to the custom of his *sect*, without kissing the book.

2 Sid. 6.
2 Keb. 314.
Stra. 1104.
2 Eq. Ca. Ab. 397.
1 Atk. 21.
Cowper, 390.

AT the Old Bailey in February Session 1786, *David Mildrone* was produced as a witness on the trial of *Christiana Fitzpatrick*, for larceny. He stated to the Court that he was a North-Briton, and that the way of swearing in Scotland was not to kiss the book.

MR. JUSTICE GOULD said, that on the trial of the Rebels at Carlisle in the year 1745, finding it to be the ceremony of a particular sect, he admitted a witness to swear by the form of holding up his hand, without touching the book or kissing it; and that he afterwards referred the case to the opinion of the TWELVE JUDGES, who determined that the witness was legally sworn (*a*).

UPON the authority of this case *David Mildrone* was sworn by *Thomas Shelton*, Esq. Clerk of the Arraigns, in the following form:

"YOU swear, according to the custom of your country, "and the religion you profess, that the evidence you shall "give between our Sovereign Lord the King and the pri- "soner at the bar, shall be the truth, the whole truth, and "nothing but the truth. So help you God (*b*)."

THE prisoner was convicted.

(*a*) Per KENYON, C. J. In Rex *v.* Gilham, Espin. Case 285, a Jew professing Christianity may be sworn on the New Testament, though he has not formally renounced Judaism.

(*b*) *Sed quære*, Whether the right form of swearing a Scotch covenanter is not as follows: "I, *A. B.* do swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give to the

Court and the Jury, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth. So help me God." See Mee *v.* Reid, Peake's *Nisi Prius*, 23, and Walker's Case, Old Bailey December Session 1788. 1786.

THE KING *against* WILLIAM WYNNE. CASE CXCI.

If a parcel be accidentally left in a hackney-coach, and the coachman, instead of restoring it to the owner, detain it, open it, destroy part of its contents, and borrow money on the rest, he is guilty of felony.

S. C. 2 East, 664, 697.

AT the Old-Bailey in April Session 1786, *William Wynne* was indicted before MR. BARON EYRE, for stealing a deal-box, containing a quantity of wearing-apparel and two bonds, the property of *Francis Welden*, Esq.

THE prisoner was a Hackney-Coachman, and was called from his stand between six and seven o'clock on Sunday evening, the 9th April 1786, to convey the prosecutor from *Osborne's Hotel*, in the *Adelphi*, to No. 9, *Orchard-street*, *Portman-square*. Among several trunks and packages which were put into the coach was the box mentioned in the indictment. On arriving at the prosecutor's lodgings in *Orchard-street*, the prosecutor's servant took all the articles out of the coach except this box, which remained under one of the seats. The prisoner received his fare, and drove away. In a minute or two after he was gone, the box was missed: the prosecutor called out to his servant to inform him that it had been left in the coach; ran down stairs with all possible expedition into the street after the coach, but it was gone; and all possible means were used that day to discover it, but without success. Hand-bills were dispersed the ensuing morning, and advertisements inserted in the public prints, offering a reward to any person who should bring home the box. Two days afterwards two persons called at the prosecutor's house in *Orchard-street*, and desired to speak with the gentleman who had lost the box; but he not happening to be at home, they left a description of the coach in which it had been left, and the nickname of the coachman. In consequence of this information the prosecutor went the next morning to the Coach-office, and found the number of the coach from the nickname of the coachman; and on the Thursday following,

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WYNNE'S CASE.

as the prosecutor was going along *Holborn*, he discovered both the coach and coachman waiting at a door for his fare, and immediately took him by the collar; when the prisoner said, "Sir, I and my wife were at your house this very day "with the box, but I did not leave it, because no person was "at home to pay the three guineas you offered for finding "it; and wanting money very much, I have carried it to "one *Michael Mitchel*, a Jew, who lives at No. 5, New "Castle-street, Whitechapel." The prosecutor and the prisoner went together immediately to the Jew's house. The Jew produced the box; but on examination it was found uncorded, with the hasps forced off; and two bonds, with the papers out of several pocket-books, and several of the articles mentioned in the indictment, were missing. The prisoner acknowledged that he had uncorded the box, and looked at some of the things, but denied having taken any of them away. He also acknowledged having borrowed eight shillings of the Jew's wife, when he left the box that morning in her custody. The prisoner accused the Jew of having burned the bonds. The Jew retorted the same charge upon the prisoner. But on their being taken to the Public-office in Bow-street, the coachman was committed for trial, and the Jew bound over to give evidence against him.

THE learned JUDGE observed, that as the prisoner had not originally taken possession of the property himself, but had had it thrown upon him by the negligence of the prosecutor, in leaving the box behind him in the coach, no felonious intention could be supposed to exist in his mind at the moment the property was first acquired (1); and although the subsequent circumstance of his keeping it till it was advertised was a breach of moral duty, it could not of itself be legally considered as a criminal conversion. He therefore directed the Jury, that if they thought the prisoner had detained the box merely in the hope and expectation that a reward would be offered for its restoration, and that he meant then to return it to its right owner, they ought to acquit him; but that, on the other hand, if they were in their consciences perfectly satisfied that he had uncorded the box, not merely

(1) See Charlewood's Case, *ante*, p. 409, Case 189.

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from natural though idle curiosity, but with an intention to embezzle any part of its contents (*a*), and that he had actually taken the goods mentioned in the indictment, it would become a matter of legal consideration, whether a person so guilty should not be reached as a felon?

THE Jury found the prisoner *Guilty*; but the judgment was respited, and the case submitted to the opinion of the TWELVE JUDGES.

IN the July Session following the prisoner was put to the bar, and informed by the RECORDER, that his case had been considered by the JUDGES, and that they approved of the verdict the Jury had given.

HE received sentence of transportation for seven years (*b*).

(*a*) At the Old Bailey Sessions before Michaelmas Term 1701, the case was that a woman had trusted a porter to carry a bundle for her to Wapping, and went with the porter; and in going to the place the porter ran away with the bundle, which was lost; and being tried for felony on this fact, HOLT, C. J. directed the Jury that if they thought that the porter opened the bundle, and took out the goods, it was felony, and they ought to find him guilty, and he thought that the fact as above stated was evidence of it, 2 East, 697; but Mr. East states a different ground for the determination as suggested in another manuscript, namely, that all the circumstances of the case shewed that the porter took the bundle at the first with an intent to steal it. 2 East, P. C. 698.

(*b*) At the Old Bailey in January Session 1789, *John Sears* was indicted before MR. JUSTICE ASHHURST, for STEALING a parcel of calico, and other things, the property of *Sarah Dixon*. The prosecutrix hired the prisoner, a hackney-coachman, to drive her from her house in Manchester-Buildings to a linendraper's in Oxford-road, where she purchased the articles named in the indictment. They were tied up in a parcel, and put into the coach. The prisoner drove back to Manchester-Buildings, and the prosecutrix, on getting out of the coach, ordered him to give the parcel to her servant; but he neglected so to do. She went into the parlour to speak to company, and in about two minutes returned to the street-door, where she saw the coach-door shut, and the window up: and after giving him three shillings, which was sixpence more than his fare, because he had driven expeditiously, he drove away. The things were advertised, and a reward offered to any person who should restore them; but without effect. A few days afterwards the prosecutrix met the prisoner; but he denied all knowledge of her person, or of the things, or of his ever having had such a

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fare, and said that he had only driven the coach two days. The parcel, however, was traced to the prisoner's possession, and it appeared that it had been opened and three yards taken off from the piece of calico. The prisoner on his defence acknowledged that he had driven the prosecutrix from Manchester-Buildings to the linendraper's, and back again, but he denied that she ever desired him to deliver the parcel to her servant. Upon this evidence he was convicted of FELONY, and received sentence of imprisonment for six months, by virtue of the statutes of 5 Anne, c. 6. and 19 Geo. III. c. 74. s. 3.—To this case may be added the Case of Rex v. Lamb, at the Old Bailey in the year 1694, where a gentleman left a trunk in a hackney-coach, and the coachman took and converted it to his own use, and it was held felony; for he must have known where he took up the gentleman and his trunk, and where he set him down, and therefore he ought to have restored it to him. 2 East, c. 16. s. 99. from the MS. of Mr. Serjeant Forster.

CASE CXCII.

THE KING *against* CHARLES LEE.

A variance on the 13 Geo. III. c. 56. between a *Lion rampant* and a *Lion passant* held fatal.

OLD BAILEY May Session 1786. This was an indictment on the statutes 12 Geo. II. c. 26. s. 8. 31 Geo. II. c. 32. s. 14. 24 Geo. III. c. 53. s. 16 (*a*). for removing from one silver knee-buckle to another silver knee-buckle certain stamps, marks, and impressions; *to wit*, the *King's head* and the *Lion rampant*; with intent to defraud the King, against the statute, &c.

ON producing the silver knee-buckle in evidence, it appeared, that the mark was a *Lion passant* (*b*), instead of a *Lion rampant*; and THE COURT held the variance fatal.

(*a*) See also 38 Geo. III. c. 69. and the 52 Geo. III. c. 143. s. 8. by which last statute the transposing of silver stamps is made a capital offence.

(*b*) The 12 Geo. II. c. 26. s. 5. forbids the selling of gold or silver wares until it is stamped with the marks of the Goldsmiths' Company, viz. the *leopard's head*, the lion *passant*, and a letter to denote the year, and the 24 Geo. III. c. 53. s. 5. requires on such wares the mark of the *King's Head*.

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THE KING *against* JAMES GASTINEAUX. CASE CXCIII.

On an indictment for maliciously shooting at another, the offence must be committed under such circumstances, that, if death had ensued, the homicide would be *murder*.

See 1 East, P. C. 412. 4 Black. Com. 207.

AT the Old Bailey in May Session 1786, *James Gastineaux* was tried before MR. SERJEANT ADAIR, Recorder, on the statute of 9 Geo. I. c. 22. for wilfully and maliciously shooting at *Robert Parry*, in the dwelling-house of *Joseph Gurney*, with a loaded pistol, on the 3d May 1786.

PARRY, servant to a brandy-merchant in Bishopsgate-street, was ordered by his master to take five gallons of brandy to the house of Mr. *Gurney*, a publican. The prisoner, an excise-officer, perceiving *Parry* passing with a five-gallon keg along the street, near to *Gurney*'s house, and imagining it to contain a seizable commodity, stopped *Parry*, and desired to see the permit. *Parry* on his part insisted on seeing *Gastineaux*' deputation. A violent altercation arose between them, and they walked on quarrelling with and aggravating each other, until they reached *Gurney*'s house. *Parry* refused to take the keg from his shoulder, and soon afterward a scuffle ensued between them, during which the brandy fell on the ground. The prisoner was at this time standing close to *Parry*, when some person cried out, *Mind! mind!* and the prisoner immediately fired the pistol at *Parry*; but it missed him, and wounded one of *Gurney*'s servants.

THE COURT. The offence charged in this indictment is described by the statute on which it is framed in very few and very clear words; which are, "that if any person or persons shall wilfully and *maliciously* shoot at any person in any dwelling-house or other place, he shall be adjudged guilty of felony, without benefit of clergy." The word *maliciously* is made to constitute the very essence of this crime; no act of shooting therefore will amount, under this statute, to a capital offence, unless it be accompanied with such circumstances as in construction of law would have amounted to the crime of MURDER, if death had ensued from such act. This proposition most clearly and unavoidably results from

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the legal interpretation of the word *maliciously*, as applied to this subject; for there is no species of homicide in which malice forms any ingredient but that of murder (*a*); and it follows, that neither an accidental shooting, nor a shooting in the transport of passion, excited by such a degree of provocation as will reduce homicide to the offence of manslaughter, are within the meaning of the statute; for from both of these cases the law excludes every idea of malice.

THE learned JUDGE then recapitulated all the circumstances of the evidence, and explained the nature of the several species of homicide, with the degrees of guilt annexed to each by the laws of England.

THE JURY being of opinion, that if death had ensued from the act of shooting in the present case, it would have been a malicious homicide, they found the prisoner *Guilty*.

(*a*) See the statute 43 Geo. III. c. 58. by which the offence of maliciously shooting at another is extended; but it is expressly enacted that the offence must amount to murder if death had ensued, to bring it within the penalties of the Act.

CASE CXCIV. THE KING *against* WILLIAM HASLAM.

A principal felon is a competent witness on the statute 22 Geo. III. c. 58. against an accessary for receiving stolen goods. S. C. 2 East, 782.

OLD BAILEY May Session 1786. The statute 22 Geo. III. c. 58. recites, that the pernicious practice of buying and receiving stolen goods had become a great evil, by reason of the difficulty of discovering the persons guilty of the same, and of the insufficiency of the laws in being for the punishment of such offenders; and therefore it enacts, "That in all cases whatsoever where any goods or chattels (except lead, iron, copper, brass, bell-metal, and solder,) shall have been feloniously taken or stolen, every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken or stolen, shall be guilty of, and may be prosecuted for, a MISDEMEANOR, although the principal felon be not before *convicted* of the felony, and whether such felon

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be *amenable to justice or not:* and if the felony amount to grand larceny, or some greater offence, and the principal felon shall not have been convicted, such offender shall be exempted from being punished as an accessary, if the principal shall be afterwards convicted."

AT an adjourned Session held at the Guildhall of London on the 12th of June 1786, *William Haslam* was tried upon this statute for receiving a piece of printed callico, the property of Messrs. *Eyre* and *Acton*, he well knowing the same to have been stolen; the person who had stolen the same not having been convicted.

RICHARD ROGERS, the principal felon, was produced as a witness. The question was, Whether the principal could, in this case, be legally admitted as a witness against the accessary? and the point was debated by SHEPHERD *for the prisoner*, and by SILVESTER *for the Crown.*

THE COURT received the evidence, and the Jury found the prisoner *Guilty:* but the judgment was respited, and the case submitted to the consideration of the TWELVE JUDGES, who were unanimously of opinion, That a principal felon may be admitted as a witness against his accessary, under this Act of Parliament: and on the 6th January 1787, the prisoner was sentenced to pay a fine of five pounds, and to be imprisoned four years in the gaol of NEWGATE (*a*).

(*a*) And at the Old Bailey in July Session 1786, on the trial of *Hugh Price* for stealing, and *William Collins* for knowingly receiving a quantity of paper, the property of *Edward Cox*, MR. JUSTICE HEATH said, "There is a determination lately made on the statute 22 Geo. III. c. 58. by the TWELVE JUDGES, that ought to be publicly known, *viz.* That the principal may be admitted as a witness against the accessary under this statute." And in Patram's Case, Bridgewater Summer Assizes 1787, before MR. JUSTICE GROSE, the principal, on a prosecution under 22 Geo. III. c. 58. was admitted a witness against the receiver, and approved before all the JUDGES, 2 East, C. L. 782. See also Jonathan Wild's Case, who was indicted as a receiver on 4 Geo. I. c. 11. and the principal felon was examined as a witness on the part of the Crown. 4 Bl. Com. 132. 2 East, C. L. 770.

1786.

CASE CXCV. THE KING *against* MAJOR SEMPLE.

An indictment quashed because the addition was placed after the *alias dictus*, and not after the *first name*.
2 Inst. 669.
Cro. Eliz. 583.
Dyer, 88.

AT the Old Bailey in July Session 1786, *J. G. Semple* was put to the bar, to be arraigned on an indictment of larceny.

THE indictment stated, "That *James George Harrold*, otherwise *Semple*, otherwise *Kennedy*, LABOURER, one chaise, called a post-chaise, of the value of fifty pounds, the goods and chattels of *John Lycett*, feloniously did steal, take, and carry away, &c."

Macnamara's Case, 1790, *contra*.

BEFORE the prisoner had pleaded (*a*), it was moved to quash the indictment on the ground of informality; the *addition* being placed after the *alias dictus*, and not after the first name.

Staund. 68.
2 Hale, 177.
2 Hawk. 328.

THE COURT, upon the authority of *Staundforde*, *Hale*, and *Hawkins' Pleas of the Crown*, directed the indictment to be quashed, and the prisoner to be detained till the next Session.

(*a*) At the Old Bailey in September Session 1787, *Joseph Hannam*, otherwise *Moore*, late of the parish of *St. Dunstan's*, LABOURER, was tried for robbing *Mary Delew*. It was moved to quash the indictment on account of the *addition* being placed after the *alias dictus* and not after the *first name*. But the prisoner, on his arraignment, having *pleaded* to the indictment, the Court held, that although this would otherwise have been a clear and manifest error, yet that it was thereby cured. See also Cro. Jac. 482. and 610.

CASE CXCVI. THE KING *against* JAMES GEORGE SEMPLE.

Obtaining a post-chaise by hiring, with a felonious intent to convert it to the use of the hirer, is felony, although the contract of hiring was not for any definite time. S. C. 2 East, 691.

AT the ensuing Session the prisoner, *J. G. Semple*, was again indicted for the same offence, before ADAIR, Recorder, present MR. JUSTICE GOULD.

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SEMPLE'S CASE.

THE following facts appeared in evidence:—The prosecutor, Mr. *Lycett*, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood under the name of *Major Harrold*, and had frequently hired chaises from the prosecutor, as the occasion required, and for which he had always paid with great punctuality. On the first of September 1785, the prisoner hired a post-chaise of the prosecutor, saying, that he should want it for three weeks or a month, as he was going a tour round the North. It was agreed that the prisoner should pay at the rate of five shillings a day during the time that he kept the chaise; and a price of fifty guineas was talked about in case he should determine to purchase the chaise on his return to London, but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner fetched the chaise from Mr. *Lycett*'s with his own horses; and it was in evidence, that he was driven in it from London to the Crown and Cushion at Uxbridge, where he ordered a pair of horses, and went from thence to the *Duke of Portland*'s, and returned. He took fresh horses at the Crown and Cushion, but where he went with the chaise afterwards did not appear. The fact was, he never returned it to Mr. *Lycett*; nor could any tidings be obtained of him till twelve months afterwards, when he was accidentally apprehended by the activity of Mr. *Feltham*, in Fleet-street, upon a suspicion of having, under false pretences, defrauded him of a quantity of ladies' hats.

GARROW *for the prisoner* submitted to the Court, that admitting the whole of the evidence to be true, the offence did not amount to FELONY; and he endeavoured to distinguish the case from that of *The King* v. *Pear* (1) and *Aickles' Case* (2), inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them: but that in the present case the prisoner had obtained the chaise upon *a contract*, which it was not proved that he had broken; for the chaise was not hired for any definite length of time, or to go to any certain place; and the mere understanding that it was for three weeks or a month, for the purpose of making a

(1) *Ante*, p. 212, Case 105.

(2) *Ante*, p. 294, Case 146.

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SEMPLE'S CASE.

tour round the North, made no part of the contract. He had hired it for such a length of time as he should please to keep it, at a certain stipulated price for each day; and it being delivered to him upon those terms, he had the entire possession of it in himself, and was answerable in damages for its detention, or for any injury which might happen to it during his absence. But supposing the contract should be thought not to extend beyond the three weeks or a month, it is clear that during that time he had at least the legal possession; and then no intention to convert it wrongfully to his own use arising afterward, whether from necessity or dishonesty, will make the withholding it felony; for the *animus furandi* must exist at the time the property is obtained. In all the leading cases upon this subject of constructive felony, there has always been some evidence of a tortious *conversion*; but in this case it has not been proved that the prisoner has disposed of the chaise: it may be at this very moment in his possession, for any thing that appears to the contrary, and a conversion cannot be inferred from his having neglected to return it.

THE COURT.—The Court is bound by the determination of former cases. It is now settled, that the question of intention is for the consideration of the Jury; and in the present case, if they should be of opinion that the original hiring of the chaise was felonious, it will fall precisely within the principle of *Pear's Case*, and the other decisions which the JUDGES have made upon the subject of constructive felony. If there was a *bonâ fide* hiring of the chaise, to pay so much for every day for the use of it, and a real intention of returning it, a subsequent conversion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the *bonâ fide* contract, and subsequent delivery, the prisoner would have acquired the lawful possession of it; and therefore, although he afterwards abused that trust and that possession, felony could not ensue, because the original taking was lawful (1). But, on the other hand, if the hiring was only a pretence made use of to get the chaise out of the possession of the owner, without any intention to restore it or to pay for it, in that case, the law supposes the possession

(1) See Charlewood's Case, *ante*, page 409, Case 189.

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still to reside with the owner, though the property itself is gone out of his hands, and then the subsequent conversion will be felony. The case of *The King* v. *Pear* was very solemnly debated at LORD CHIEF JUSTICE DE GREY'S house (1); and the unanimous opinion of the JUDGES was at last, That the direction given to the Jury by the learned Judge who tried the prisoner was right. The most important part of the argument turned upon the consideration, Whether the delivery of the horse to *Pear* had in law divested the owner either of his property or the possession of it? The question left with the Jury was, Whether the contract was meant fairly? or, Whether it was a mere colour and pretence? The Jury found that it was a mere colour and pretence; and upon that finding, the JUDGES determined the taking to be felony; because it is an established principle of law, that the possession of property cannot be obtained through the medium of a fraud. But it has been attempted to distinguish the present case from *The King* v. *Pear*.—FIRST, That the hiring in this case was indefinite, but that in *The King* v. *Pear* it was certain, and limited. The time cannot be material in questions of this nature. *Pear* hired the horse in the morning, under pretence of going to *Sutton* in *Surry*, and to return in the evening: but as the hiring was found to be felonious, the law of the case must have been the same, although it had appeared that the hiring was for two days, a week, a month, or any other given time; nay, if the time had been left intirely unlimited. The circumstance of the time being long or unsettled may indeed render the proof of guilt more difficult, but cannot alter the law of the case.—SECONDLY, It is said that this case differs from *The King* v. *Pear*, because it was proved, that *Pear* had sold the horse, and therefore had converted it to his own use; but that in the present case no proof has been given that the prisoner has sold or otherwise converted the chaise. Proof of actual conversion certainly is not necessary, but the Jury must judge of it from the circumstances of the case. If the prisoner, at any time before the prosecution was commenced, had offered to restore the chaise to the owner, or to pay him for it, such a conduct would have

(1) Mr. Justice GOULD said he was one of the Judges who were present.

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been evidence of an honest intention when he originally hired it, and would have reprobated the idea of a fraudulent design. But he hires the chaise for a month, and a year passes, and neither the chaise nor the man are heard of until he is taken. There is no evidence even at this moment that the chaise is forthcoming, nor does any one pretend to know where it is. This therefore raises a presumption against the prisoner, which it is incumbent on him to repel; and if he cannot, it will be for the consideration of the Jury, under all the circumstances of the case, whether they think he has *feloniously* disposed of it, or otherwise converted it to his own use. In their determination of this point they must recur to the time of the original hiring, and to the nature and meaning of the contract then made between the parties. If they think the *re-delivery* of the chaise formed any part of the contract, the *non-delivery* of it must necessarily form a part of their consideration. They will then consider whether the *non-delivery* is sufficient evidence to satisfy their consciences that he has converted it to his own use. These two considerations will naturally lead to a third, *viz.* Whether the property thus converted was originally obtained with a felonious design? which will carry them back to the instant of time that he obtained possession of it: and if they should find the original hiring was felonious, the most ingenious subtlety cannot distinguish this case from that of *The King* v. *Pear*. There is a case in *Kelynge* of a person who took a lodging in a house, and afterwards at night, while the people were at prayers, robbed them. The Jury found that the intention of taking the lodging was to commit the felony; and the JUDGES determined that this was *burglary*. There was also a case determined very lately by the JUDGES. A man ordered a pair of candlesticks from a silversmith to be sent to his lodgings. They were sent to his lodgings, with a bill of parcels; but he contrived to send the servant back, and to keep the goods; and this was held to be felony, although they were delivered with the bill of parcels, under an expectation of being paid the money; for the Jury found, that it was a pretence to purchase, with intention to steal.

Non-delivery upon request is evidence of a tortious conversion. Cro. Eliz. 495.

See R. v. Sharpless and Greatrex, *ante*, May Session, 1772, page 92, Case 52.

The question of original intention was left with the Jury; and they found the prisoner *Guilty*. A motion was made in arrest of judgment; but it was over-ruled, and he received sentence of transportation for seven years.

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THE KING *against* JOHN FEARNLEY. CASE CXCVII.

THIS was an indictment on the statute 18 Eliz. c. 3. and 9 Geo. I. c. 7. found at the Quarter Session at *Knaresborough*, in the county of *York*, against *John Fearnley*, as one of the Overseers of and for the township of *Checkeaton*, in the said county, for neglecting and refusing to obey an order of two Justices for the maintenance of a pauper, the mother of a bastard child; the said order, on such a day, having been duly shewn, and delivered to the said *John Fearnley*.

The caption of an indictment must shew that the Court where it was found had *jurisdiction*; and on demurrer the superior Court will look into the *whole record*.

THE indictment was removed by *Certiorari* into the Court of King's Bench. The caption stated, That a Quarter Session was "holden *on Tuesday the 4th day of October*, in the 25th year of the reign, &c.: that the same Session *is adjourned* until *Thursday the 6th day of* JULY *aforesaid, in the year aforesaid.*" And then it goes on, "and on the said *Thursday the 6th day of* OCTOBER aforesaid, in the year aforesaid, is holden by adjournment, &c. And on the said *Thursday the 6th of October* aforesaid, &c. it was presented as followeth, &c."

To this indictment the defendant demurred.

FEARNLEY, in support of the demurrer, contended, *First*, That as the caption stated the Session which was held on *the 4th October* 1785, to have been adjourned to *Thursday the 6th July, in the year aforesaid*, and as the indictment was found at a Session holden by adjournment on the *sixth of October*, it appeared that the Court was held without any adjournment, and therefore had not competent jurisdiction, for that every caption of an indictment must shew that it was taken

S. P. C. 96. Cro. Eliz. 193. 4 Co. 41. Plowd. 76. Ld. Raym. 710.

1786. before a Court having competent jurisdiction. 2 *Hawk, P. C. 6th Edit.* 359.

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Where an allowance is made to a pauper WEEKLY, it is due at the beginning of the week.

See Rex *v.* Morehouse, Trin. 25 Geo. II. B. R.

Secondly, THAT the indictment only states, that the order was *shewn and delivered*, but does not state that the money directed by the Justices to be paid was demanded, either before or after it was due; and being ordered to be paid "*weekly and every week*," the defendant could not have been guilty of any disobedience before the expiration of the first week; and therefore it ought to have averred, that the woman was alive at the end of the week.

LAW *contra*. This being a demurrer to an *indictment*, no advantage can be taken of any want of form in the *caption*; and if advantage could be taken of any such defects, the present objection would not be well founded, because enough appears in the caption of this indictment to shew that the Session was adjourned till *Thursday the 6th of October*: for although in the former part of it the word JULY is erroneously inserted, yet immediately afterwards it is stated, "That on the *said Thursday, the sixth day of October*, the same General Quarter Sessions of the Peace is holden *by adjournment as aforesaid*."

B. R. Trinity Term, 1786.

THE COURT.—It is a good objection, that by the caption of the indictment it appears that the Court had no jurisdiction; and upon a demurrer to an indictment, the Court must look into the *whole record*, to see whether they are warranted in giving judgment on it: it is therefore open to objections as well to the jurisdiction of the Court where the indictment was found, as to the subject-matter of the indictment itself.

ON the other point, the Court were of opinion, that the sum which was ordered to be paid weekly was due at the beginning of the week; but whether a sufficient *demand* was stated they gave no opinion.

1786.

THE KING *against* WILLIAM TRAPSHAW. CASE CXCVIII.

A house, the whole of which is let out in lodgings, and has one outer door common to all its inmates, is the mansion-house of its several inhabitants.

S. C. 2 East, 506—780.

AT the Old Bailey in August Session 1786, *William Trapshaw* was convicted of breaking and entering the dwelling-house of *James Linney*, in the day-time, *Frances* his wife being therein, and stealing several articles of wearing apparel, value 7*s.* and 4*d.* the property of the said *James Linney:* but the judgment was respited, and the question submitted to the consideration of the TWELVE JUDGES, Whether, under the following circumstances, the room broke open by the prisoner was well laid in the indictment to be the dwelling-house of *James Linney?*

THE house was situated in the Temple-Mews, and belonged to the *Earl of Radnor*, who let *the whole* of it out in lodgings. It was inhabited by three families, and had only one outer door, which was common to all the inmates. *James Linney* rented the parlour on the ground-floor, and a single room up one pair of stairs, where he slept. It was the parlour on the ground-floor that was broke open, and the things mentioned in the indictment were taken from that room by the prisoner.

THE JUDGES assembled at LORD LOUGHBOROUGH'S chambers on the first day of Hilary Term, to consider this case; and at the Old Bailey, in the February Session following, MR. JUSTICE GOULD publicly delivered their opinion.

MR. JUSTICE GOULD.—The indictment upon which this question arises, is founded on the second part of that clause of the statute 3 & 4 Will. and Mary, c. 9. s. 1. which enacts, "That all and every person or persons that shall at any time *rob* any other person, or shall feloniously take away any goods or chattels being in any dwelling-house, the owner or any other person being therein, and put in fear; OR *shall rob any dwelling-house in the day-time, any person being therein;* OR shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to commit any of the said offences; OR to break any dwelling-house, shop, or warehouse there-

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unto belonging, or therewith used in the day-time, *and feloniously take away any money, goods, or chattels of the value of five shillings* or upwards, therein being, although no person shall be within such dwelling-house, shop, or warehouse; or shall counsel, hire, or command any person to commit any burglary, shall not have the benefit of his or their clergy." The word *rob*, in a legal construction, always includes the idea of *force and violence;* and although this part of the statute does not expressly signify that *breaking and entering* the house is necessary to constitute the crime, yet it has always been held upon this statute, as well as upon other Acts of Parliament penned in the same manner, that those ingredients are *ex vi termini* included in, and implied by, the word ROB. It is therefore essential to consider what degree of breaking and entering is necessary; and it is settled in a variety of determinations upon the statutes relating to this subject, that the breaking must be of a *dwelling-house*, in the same way as would be necessary to constitute the crime of burglary upon the rules of the common law; the only difference between the two offences being, that burglary must be committed in a dwelling-house in the night-time, and this offence must be committed in a dwelling-house by day. The next consideration therefore is, what shall be considered as a dwelling-house within the meaning of this Act of Parliament.

The King *v.* Rogers, *ante*, page 89, Case 50.

In Mic. Term 1773, a case on a conviction of burglary was determined by the JUDGES, the circumstances of which were analogous to the present case. The owner of the house had let *the whole* of it to different lodgers. The prosecutor rented a room on the first floor, a shop and a parlour on the ground-floor, and a cellar underneath the shop, at 12*l.* 10*s.* a-year. The owner took back the cellar to keep lumber in, for which he allowed the prosecutor a rebate out of his rent of 10*s.* a-year. The entrance was into a passage by a door from the street, and on the side of the passage one door opened into the shop and another into the parlour; and beyond the parlour was the stair-case, which led to the upper apartments. The shop and parlour-doors were broke open; and the JUDGES determined that these rooms were properly laid to be the

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dwelling-house of the prosecutor; for it could not be called the mansion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purposes before-mentioned. And the number of houses, especially in the metropolis, which are in a similar situation, must have been left entirely unprotected against burglary, had it been determined that the apartments of lodgers were not their dwelling-houses, when the owner has, as it were, abandoned the dwelling himself, and left the whole house to their enjoyment and possession. In February Session 1781, the case of *The King* v. *Carrel* for burglary, was reserved by Mr. *Recorder*. The house belonged to one *Nash*, who had let *the whole* of it in separate tenements. *Jordan*, the prosecutor, as tenant at will to *Nash*, rented a sleeping-room up one pair of stairs, and a workshop in the garret; the door of this workshop was broke open; and the question was, Whether it could be considered as the mansion of *John Jordan* the prosecutor? and according to my note of this case, the JUDGES were unanimously of opinion in the affirmative; and they relied upon *The King* v. *Rogers* as a case in point; but I have seen a manuscript of the same case by MR. JUSTICE BULLER, in which he takes notice, that only TEN of the TWELVE JUDGES were of this opinion; and from the known accuracy of that learned Judge, I must presume that the fact was as he stated it: but I have no recollection that either *he* or MR. BARON EYRE dissented at the time from the opinion of the other Judges (*a*). In the present case, however, all the JUDGES are of opinion, That the two determinations which I have recited are precisely in point; and that the present indictment properly charges the room broke open to be the dwelling-house of *James Linney*. The reason of this opinion becomes evident the moment it is stated. The owner of the house is, if I may so express

The King *v.* Carrel, *ante*, page 237, Case 118.

Ante, page 89, Case 50.

(*a*) In Easter Term 1782, TEN JUDGES against TWO held in Carrel's Case the offence well laid, upon the authority of R. *v.* Rogers; but BULLER J. and EYRE B. thought that it was not the mansion-house of *Jordan*, but that it might have been laid to have been the mansion-house of *Nash*, to which some of the others inclined, if it were not the mansion of *Jordan*, 2 East, P. C. 506.

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myself, THE LORD of it; but having relinquished every part of it to the habitation of others, it cannot with any propriety be considered as *his* mansion or dwelling-house. The entirety which resides with him is split into several possessions; and every separate apartment, being in a distinct and several occupation, is the distinct mansion-house of its respective possessor.

THE prisoner accordingly received sentence of *Death*.

CASE CXCIX.

THE KING *against* WHITE.

A person who has no notion of *eternity* or of a future state of *reward and punishment* cannot be examined as a witness; but the trial may be postponed until the witness is instructed in the nature of this obligation.

ON the trial of an indictment at the Old Bailey for horse-stealing, in October Session 1786, *Thomas Atkins* was called as a witness to support the prosecution.

BEING examined on the *voir dire*, he said, that he had heard there was a God, and believed that those persons who tell lies would come to the gallows; but acknowledged that he had never learned THE CATECHISM, was altogether ignorant of the obligations of an oath, a future state of reward and punishment, the existence of another world, or what became of wicked people after death (*a*).

THE COURT rejected him, as being incompetent to be sworn; for that an OATH is a religious asseveration, by which

(*a*) MR. JUSTICE ROOKE, in a criminal prosecution that was coming on to be tried before him at Gloucester, finding that the principal witness was an infant who was wholly incompetent to take an oath, postponed the trial till the following assizes, and ordered the child to be instructed in the mean time by a clergyman in the principles of her duty, and the nature and obligation of an oath. At the next assizes the prisoner was put upon his trial, and the girl being found by the Court, on examination, to have a proper sense of the nature of an oath, was sworn, and upon her testimony the prisoner was convicted, and afterwards executed. MR. J. ROOKE mentioned this at the *Old Bailey* in 1795, in the case of *Patrick Murphy*, who was indicted for a rape on a child of seven years old, and the learned JUDGE added, that upon a conference with the other JUDGES upon his return from the circuit, they unanimously approved of what he had done. See Mr. Gwillim's edit. of Bacon's Abr. vol. II. page 577. *notis.*

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a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice (*a*).

(*a*) In the case of Omichund *v.* Barker, in Ch. Mich. Term 1744, on a question determined by LORD HARDWICKE, LEE C. J. WILLES C. J. and PARKER C. B. as to the admissibility of the evidence of a *Gentoo*, it was said by WILLES C. J. and agreed by the Court, that persons who do not believe in God, or in a future state of rewards and punishments, clearly ought not to be admitted as witnesses, 1 Atkins, 45. and the testimony of a witness was rejected on this ground by MR. JUSTICE GROSE at Bedford Spring Assizes 1789, on an indictment of murder.

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CASE CC.

THE KING *against* MOFFATT.

A bill of exchange drawn for less than the *sum*, and not in the *form* required by the statute 17 Geo. III. c. 30. cannot be the subject of a *capital* forgery. S. C. 2 East, 954.

AT the Old Bailey in January Session 1787, *John Moffatt* was indicted on the statute 2 Geo. II. c. 25, and 7 Geo. II. c. 22. before MR. SERJEANT ADAIR, Recorder, for forging and uttering the acceptance to a bill of exchange, to the following purport:

"SIR, NAVY-OFFICE, 21*st December*, 1786.

"SEVEN DAYS after date, please to pay to Mr. *John Moffatt*, or his order, the sum of three pounds three shillings, and place the same to the account of

"WALTER STERLING."

"To *George Peters*, Esq.
BANK OF ENGLAND."

"*Accepted, G. Peters.*"

Indorsed, "JOHN MOFFATT, now Surgeon of the Scipio Guard-ship at Sheerness."

THE indictment consisted of eight counts, charging the prisoner with having forged the name of the drawer, and the

1787. acceptance of the said *George Peters;* and with uttering the same knowing them to be forged: and these four offences were respectively laid to have been committed with an intention to defraud, 1st, *William Bell;* and 2dly, *George Peters.*

MOFFATT'S CASE.

Mr. Knowlys.

On producing the note in evidence, an objection was taken in favour of the prisoner by a gentleman at the bar, that it was not stamped pursuant to the statutes of 23 Geo. III. c. 49. and 24 Geo. III. s. 1. c. 7. and therefore could not be admitted in evidence. But the Court over-ruled this objection, upon the authority of *The King* v. *Hawkeswood* (*a*); and the Jury found the prisoner *Guilty*, subject to the opinion of the TWELVE JUDGES upon the following case:

By the statutes of 15 Geo. III. c. 51. and 17 Geo. III. c. 30. (which continued in force until the end of the Session of Parliament during which the forgery was committed,) it is enacted, "That all promissory or other notes, *bills of exchange*, or draughts, or undertakings in writing, being negotiable or transferable for the payment of *twenty shillings*, or any sum of money above that sum and less than *five pounds*, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, or which shall be issued in *England*, shall specify the names and places of abode of the persons respectively to whom or to whose order the same shall be made payable; and shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto; and shall be made payable within the space of twenty-one days next after the date thereof; and shall not be transferable or negotiable after the time thereby limited for the payment thereof; and that every *indorsement* to be made thereon shall be made before the expiration of that time, and to bear date at or not before the time of making thereof; and shall specify the name and place of

(*a*) See Hawkeswood's Case, Worcester Spring Assizes 1783, *ante*, page 257, Case 129. Rex *v.* Morton, York Summer Assizes 1795, 2 East, 955. Rex *v.* Colin Reculist, Old Bailey January Session 1796, *post*. Rex *v.* Charles Davis, Surry Spring Assizes 1796.

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abode of the person or persons to whom or to whose order the money contained in every such note, *bill*, draught, or undertaking is to be paid; and also every such indorsement shall be attested by one subscribing witness at least; and which said notes, *bills of exchange*, or draughts, or undertakings in writing, may be made or drawn in words to the purport or effect as set out in the schedule hereunto annexed (*a*); and that all promissory or other notes, *bills of exchange*, or draughts, or undertakings in writing, being negotiable or transferrable for the payment of *twenty shillings*, or any sum of money above that sum and less than *five pounds*, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, and which shall be issued in *England* in any other manner than as aforesaid; and also every indorsement on any such note, *bill*, draught, or undertaking, to be negotiated under this Act other than as aforesaid; shall, and the same are hereby declared to be *void*, any law, statute, usage, or custom, to the contrary thereof in any wise notwithstanding." The statutes then impose a penalty of not less than *five pounds*, nor more than *twenty pounds*, on any person who shall *utter*, *publish*, or *negotiate* notes, *bills of exchange*, *&c.* contrary to the method above prescribed. But by the preamble, these clauses are not to operate in prejudice to the negotiation of promissory notes, and inland *bills of exchange* for the remittance of money in discharge of any balance of account, or other debt.

Place, *Day*, *Month*, *Year*.

(*a*) TWENTY-ONE days after date pay to *A. B.* of *(Place)* or his order, the sum of Value received, as advised by

To *E. F.* of *(Place)*. *C. D.*

Witness *G. H.*

The indorsement *toties quoties*.

Day, *Month*, *Year*.

PAY the contents to *J. K.* of *(Place)* or his order,

Witness *L. M.* *A. B.*

N.B. There is another form mentioned in the Act for *promissory notes*.

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MOFFATT'S CASE.

THE question referred to the JUDGES was, Whether, if the bill of exchange set forth in the indictment be void by the above statutes, inasmuch as it is not drawn according to *the form* prescribed; the bill not specifying *the place of abode of the payee*, nor being *attested by any subscribing witness*, the forging of it can become the subject of a capital offence within the meaning of the statutes of 2 Geo. II. c. 25. and 7 Geo. II. c. 22.?

IN February Session 1787, MR. JUSTICE GOULD signified that all the JUDGES had, in the preceding Hilary Term, taken this case into their consideration, but that they thought it a subject which required farther deliberation.

IN the May Session following, MR. JUSTICE ASHHURST delivered their unanimous opinion, That as the forgery was committed before the expiration of the statutes of 15 Geo. III. c. 51. and 17 Geo. III. c. 30. (*a*), the bill of exchange, if real, would not have been valid or negotiable; and therefore the forging of it was not a *capital offence* (*b*).

(*a*) These statutes were made perpetual by 27 Geo. III. c. 16. but they were again suspended by the statutes 37 Geo. III. c. 32, 61, 120. 38 Geo. III. c. 7. 39 Geo. III. c. 9, 24, 47, and 107. s. 8. 43 Geo. III. c. 1. 44 Geo. III. c. 4. and 45 Geo. III. c. 25. until six months after the ratifications of a treaty of peace, and are then revived as amended by 37 Geo. III. c. 32.

(*b*) See Mackintosh's Case, Old Bailey September Session 1800, *post*.

CASE CCI.

THE KING *against* FRANCIS PARR.

Obtaining and indorsing a dividend warrant at the Bank in the name of a stockholder, is, "personating a proprietor, and *thereby* endeavouring to receive the dividend," although no attempt whatever is made to receive the money at the Pay-Office.—S. C. 2 East, 1005.

AT the Old Bailey in January Session 1787, *Francis Parr* was tried before MR. SERJEANT ADAIR, Recorder, on the statute 31 Geo. II. c. 22. s. 77. for personating *Isaac Hart*, of *Windsor*, the true and real proprietor of and in 3900*l.* capital stock, and *thereby* falsely *endeavouring to receive* from

the Governor and Company of the Bank of England the sum of 58*l.* 10*s.* as and for half-a-year's annuity, as if HE was the said true and lawful owner of the money.

IT appeared in evidence, that the prisoner applied to Mr. *George*, the dividend-payer of the three *per cent.* Consols at the Bank, for the dividend on 3900*l.* stock, in the three *per cent.* Consols, amounting to 58*l.* 10*s.*

THE application was in the following form:—The prisoner said, "*Isaac Hart* 3900*l.*" Mr. *George* asked, "*Of what place?*" The prisoner replied, "*Of Windsor,*" which agreed with the description in the book. Mr. *George* turned the dividend book round to the prisoner, and he signed the name *Isaac Hart* as the proprietor. Mr. *George* then gave the prisoner a dividend warrant for the sum of 58*l.* 10*s.* which the prisoner indorsed in the name *Isaac Hart.*

IN order to receive the money upon a dividend warrant, it is necessary for the bearer of it to apply to the Pay-Office, which is situated at some distance from the office in which the warrants are delivered out; but it was in proof that the prisoner, instead of attempting to receive the money at the Pay-Office, had walked a different way with the warrant in his pocket, and no attempt was in fact ever made to receive it; for the prisoner was apprehended in about ten minutes after he had procured the warrant, as he was standing in the Rotunda of the Bank.

MORGAN and KNOWLYS, *for the prisoner*, contended, that this evidence did not maintain the charge in the indictment, or satisfy the meaning of the statute on which it was founded. The Legislature, they said, had made two distinct and independent acts necessary to be performed before the offence could be completed. FIRST, That the true and real proprietor of the stock should be personated. SECONDLY, That the person personating the proprietor should endeavour to receive the money. The words of the statute are, that "if any person or persons whatsoever shall falsely and deceitfully personate any true and real proprietor of the share or shares, or any part of any share or shares, annuities, or dividends,

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of or in such capital stocks or funds as have been established by the authority of Parliament since the passing of the statute of the 8 Geo. I. c. 22. and thereby transferring or endeavouring to transfer the stock, or receiving or endeavouring to receive the money of such true and lawful proprietor, as if such offender were the true and lawful owner thereof; then every such person or persons shall be deemed guilty of felony, and suffer death as a felon without benefit of clergy." In obtaining the warrant, the prisoner, they said, had certainly completed the first act which the statute mentions, of personating the true and real proprietor of the stock; by which means he was enabled to perform the other act which is necessary in order to complete the offence, *viz.* endeavouring to receive the money. The mere act of obtaining the warrant cannot be construed an endeavour *thereby* to receive the money; because it is the instrument only by the means of which the endeavour is afterwards to be made. They are two distinct and separate acts. The warrant furnished the means of receiving the money; but if the party do not by the use of those means endeavour to receive the money, he has barely procured the means of completing the offence, but it cannot be said that he has *thereby* endeavoured to receive it. If the prisoner had gone to the Pay-Office and tendered the warrant, or prepared or shewed any design or intention so to do, it would have been an endeavouring thereby to receive the money; but, instead of using any endeavour for this purpose, he silently put the warrant into his pocket, and walked a different way, without doing any act, or discovering the least intention to complete the offence. It is evident from the preamble and general scope of the Act of Parliament, that it was intended to prevent the property vested in the Funds from being tortiously obtained by those who have no title to it; and to complete the offence, the act done must be such as would effectuate the mischief which the Legislature intended to prevent. No act therefore from which that mischief would not immediately and unavoidably result, can be considered within the meaning of the statute. An interval is afforded for repentance to interpose between the act of personating the proprietor, and the act of endeavouring to

receive the money; and if during the progress to completion, the final perpetration of the crime be prevented, either by the suggestions of conscience or by early detection, the offender cannot be found guilty; for the crime, though commenced, is not completed. 1787. PARR'S CASE.

THE COURT were of opinion, That the act of personating the proprietor, and thereby obtaining the warrant to receive the dividend, was evidence of an endeavour to receive the money. The facts of the case being accordingly left with the Jury, they found the prisoner GUILTY; but, on account of the importance of the question, and of the different manner in which this statute is penned from some others on the same subject, it was thought proper to respite the judgment, and to refer the point of law to the determination of the TWELVE JUDGES. 9 Geo. I. c. 12. 9 Geo. II. c. 34. 11 Geo. II. c. 27. 1 Hawk. 207.

MR. JUSTICE GOULD, in the February Session following, after stating the form of the indictment, the facts that were given in evidence, and the words of the statute, delivered the opinion of the JUDGES to this effect:—This case has been taken into consideration by all the JUDGES, and has been attended to with deep and serious deliberation; and it is their unanimous opinion, That the manner in which the prisoner applied to the Officer of the Dividend-Office at the Bank and obtained the warrant, was a personating of *Isaac Hart*, the true and lawful proprietor of the stock; and that the prisoner thereby endeavoured to receive the money of *Isaac Hart* within the true intent and meaning of the Act of Parliament. If he had actually received the money, he would have accomplished the mischief against which the Legislature intended to guard; and then no possible doubt could have existed with respect to his guilt. The Legislature therefore has sagaciously and wisely attempted to prevent the mischief, by enacting that no person shall endeavour, or take any steps towards obtaining the money which others have lodged in the Funds. The question therefore is, Whether the prisoner did take any steps for this purpose? The Jury have found that he came forward, personated and assumed the name of a real proprietor; that he called himself *Isaac Hart*; that he wrote the name *Isaac Hart* in the Bank-Book; that the divi-

1787.

PARR'S CASE.

dend warrant is made out in that name; that the prisoner indorsed it in that name; and that by such indorsement any person who should be the bearer of it would be entitled to receive the dividend at the Pay-Office. This statement of the facts alone, without using any argument, is sufficient to shew that the prisoner, by personating the proprietor, and by obtaining and indorsing the warrant, thereby made an endeavour, as far as it went, towards receiving the dividend. The JUDGES therefore are unanimous, That the evidence in this case supports the charge, and that the prisoner is legally convicted, within the meaning of this Act of Parliament.

THE prisoner received sentence of death at the close of the session, and was executed accordingly.

N. B. *Isaac Hart*, the proprietor of the stock, was examined in this case (*a*), to prove the amount of the stock which he had at the Bank: and that the sum of 58*l.* 10*s.* was due *to him* for half a year's interest thereon. But he was not examined as to the falsity of the signature.

(*a*) See the case of Rex *v.* Rhodes, 2 Strange, 728, where on an indictment for forging a letter of attorney, whereby the prisoner had transferred the stock of a Mr. *Heysham*, MR. JUSTICE FORTESCUE refused to let *Heysham* be a witness.

CASE CCII.

THE KING *against* AICKLES.

A person who has for many years been known by a name which was not his own, and afterwards assumes his real name, and in that name draws a bill of exchange, is not guilty of forgery, though the bill was drawn for the purposes of fraud.—S. C. 2 East, 968.

AT the Old Bailey in February Session 1787, *John Henry Aickles* was indicted before MR. JUSTICE GROSE, for forging a certain promissory note for the payment of money with intent to defraud *Robert Hervey Gedge.*

THERE was a second count, for uttering it, knowing it to be forged, with the like intention. The form of the note was as follows;

" *£.* 25 : 10 : 0. LONDON, 18*th December* 1786.

" THREE MONTHS after date, I promise to pay to *Henry*

1787.

AICKLES'S CASE.

Byron, Esq. or order, twenty-five pounds ten shillings, for value received.

" *No. 4, Argyle-street, Oxford-road.*" " JOHN MASON."

HENRY BYRON, the payee of the note, went on the 9th Jan. 1787, to the shop of Mr. *Gedge*, a linen-draper in Leicester-fields, and having looked out several pieces of goods to the amount of twenty guineas, he presented the note above described in payment. Mr. *Gedge* asked *Byron* who *John Mason*, the drawer of it, was. *Byron* answered, " He is a gentleman of considerable fortune, with whom I am concerned in the profits of a coal-mine; and he lives at No. 4, *Argyle-street, Oxford-road.*" Mr. *Gedge*, however, refused to take the note until he had inquired into its validity; and *Byron* very readily left the note with him *unindorsed* for that purpose, desiring that he would not send the goods until he was perfectly satisfied. Mr. *Gedge* accordingly sent his servant to No. 4, *Argyle-street*, where he was introduced to the prisoner as Mr. *Mason*. The prisoner on being shewn the note, said, that the name JOHN MASON was his hand-writing, and that it would be punctually paid when due; but before Mr. *Gedge* had parted either with the note or with the goods, *Byron* was apprehended for defrauding a hosier, and *Aickles* for having returned from transportation before the time of his exile had elapsed. It appeared that the prisoner had taken the house in *Argyle-street*, about a month before he was apprehended, in the name of *John Mason*; and had signed a written agreement in *that name* with his landlord, who had inquired his character in *that name*, at a coffee-house in *Round-court* in the *Strand*, where a good character was given him. He was also known by the name of *John Mason*, where he had before lodged. The prisoner alleged in his defence, that *John Mason* was his *real name*; but it was proved, that he had been known for several years by the name of *John Henry Aickles*, and had been several times tried at the Old Bailey in that name, by which name only he had been known from the year 1800 to the present time; and that he had assumed the *name* of *John Mason* for the purpose of avoiding

See this Case *ante*, p. 390, Case 184.

Ante p. 294. Case 146.

1787. the detection to which the longer use of his *former name* would unavoidably have exposed him.

AICKLES'S CASE.

Mr. Knowlys. It was contended by a gentleman at the bar, in behalf of the prisoner, that these facts did not amount to the crime of forgery, for that the law required the act to be done in the name of *another* person.

The learned Judge told the Jury, That the only ground on which there was a pretence to convict the prisoner was, that this note was drawn by the prisoner in consequence of a scheme, concerted between him and *Byron* to defraud *Gedge;* that he had never gone by the name of *John Mason* before, but had assumed it for the purpose of this fraud; and that if they were of opinion that these facts were proved, they might find them specially, and the case should be reserved for the opinion of the Judges.

The Jury found the matter specially, *viz.* That the prisoner intended to defraud *Gedge*, and had assumed the name of *Mason* for the purpose of negotiating the note in confederacy with *Henry Byron;* that he had never gone by the name of *John Mason* before; and that they disbelieved a witness on the part of the prisoner, who deposed that two years ago he was inquired for and known by that name at the British Coffee-house.

Upon this a verdict of *Guilty* was taken, and the case reserved for the opinion of the Judges.

Mr. Justice Ashhurst in May Session 1787 said, "The Judges have been consulted upon the law of this case; and they are of opinion, That, *under the particular circumstances which occurred in evidence*, the indictment is not maintainable, and therefore the judgment must be staid." (*a*).

(*a*) This judgment, it seems, was given under a misconception that the Judges had so decided in Easter Term, but the fact was, that the consideration of the case was then adjourned to Trinity Term, when it was further considered, and many of the Judges seemed to entertain an opinion that it was forgery, but several thought otherwise, and they never came to any final resolution on the matter. See S. C. East's C. L. 968, 969, where the different opinions of the Judges upon this case, together with Mr. East's reasonings upon the subject, are stated.

THE prisoner having been tried in the former part of the Session for returning from transportation, and acquitted, was remanded under his former sentence. 1787.

THE KING *against* GEORGE BATH AND OTHERS. CASE CCIII.

A sentence of transportation may be a second time passed upon a prisoner, although the term for which he was before transported is unexpired.

AT the Old Bailey in February Session 1787, *George Bath*, *William Bateman*, *Thomas Warner*, and *Michael Doyle*, were convicted before MR. BARON THOMPSON of grand larceny, and received sentence to be transported for the term of seven years. But as the first three stood charged with *a capital offence* in the county of *Surrey*, a detainer was lodged against them, and they were removed to the gaol of that county. At the ensuing Lent Assizes at *Kingston* for the county of *Surrey*, the same *George Bath*, *William Bateman*, and *Thomas Warner*, were accordingly tried before MR. BARON THOMPSON, on the statute 24 Geo. II. c. 45. for stealing to the amount of forty shillings on a navigable river; and the Jury found *George Bath* guilty of the single felony, and acquitted *Bateman* and *Warner*, who were remanded back to Newgate, to undergo the sentence of transportation which had been passed upon them at the *Old Bailey*.

THE COURT doubting whether they could pass sentence of transportation upon *George Bath* a second time, his judgment was respited, and he was committed to the county gaol until the opinion of the JUDGES could be taken.

THIS was said to be a *new Case*, and it was mentioned to the JUDGES separately, but never received their collective consideration.—MR. JUSTICE GROSE however, at the Lent Assizes for *Kingston* 1788, passed sentence of transportation on the prisoner for the term of seven years, to commence from the time of his conviction at the Lent Assizes 1787; and he was transported accordingly pursuant to his sentence.

1787.

CASE CCIV. THE KING *against* PRIDDLE.

A person convicted on an indictment for *a conspiracy* cannot be a witness.
Kely. 33, 37.
2 Bulst. 154.
Raym. 32.
Co. Lit. 6.
1 Hale, 306.
2 Hale, 277.
2 Salk. 689.
5 Mod. 15, 76.
Skyn. 578.
2 Wils. 18.
Gilb. L. E. 139.
Eden. P. L. 61.
2 Hawk. 609.

WILLIAM PRIDDLE, *Robert Holloway*, and *Stephen Stephens*, were convicted at the Old Bailey in April Session 1787 of CONSPIRACY; and sentenced to pay a fine of 6*s.* 8*d.* each, and to be imprisoned in his Majesty's gaol of Newgate, *viz. William Priddle* for the term of two years, and *Robert Holloway* and *Stephen Stephens* for the term of eighteen months.

DURING the course of their confinement *George Crossley*, against whom they had been convicted of CONSPIRING, was indicted at Hicks's Hall for wilful and corrupt perjury; and the indictment being removed into the Court of King's Bench, came on to be tried before MR. JUSTICE BULLER, at the sittings at Westminster after Trinity Term 1787.

AT the trial, *William Priddle* was produced as a witness on the part of the prosecution; and being examined on the *voir dire*, he acknowledged (*a*) that he had been convicted of the CONSPIRACY above-mentioned, and was then brought up under a *Habeas Corpus* from his confinement for that offence.

THE defendant's Counsel objected to his being examined, and submitted to the Court that a conviction of conspiracy rendered the party infamous, and destroyed his competency as a witness.

MR. JUSTICE BULLER. Conspiracy is a crime of a blacker dye than barratry, and the testimony of a person convicted of barratry has been rejected. It is now settled, that it is

(*a*) In Michaelmas Term 1791, an application was made to the Court of King's Bench to bail a prisoner in custody on a charge of *Grand Larceny*. One of the bail was asked whether he had not stood in the pillory for *perjury?* This question was objected to as tending to criminate him. But THE COURT overruled the objection, because the answer could not subject him to any punishment. The bail admitted the fact, and was, of course, rejected. Rex *v.* Edwards, 4 Term Rep. 440.

1787.

PRIDDLE'S CASE.

the infamy of the crime which destroys the competency, and not the nature or mode of punishment. A conviction therefore of any offence which is comprehended under the denomination of *crimen falsi*, destroys the competency of the person convicted, as perjury (1), forgery by the common law, &c.

(1) Rex *v.* Edwards, 4 Term Rep. 440.

THE testimony of the witness was rejected (*a*).

(*a*) In Hilary Term 28 Geo. II. in *B. R.* a case which had been reserved at the Assizes for Kent on the trial of an ejectment, was argued on the question, Whether *Joseph Jeffry*, one of the three subscribing witnesses to the will of *John Mackender*, was a competent witness within the statute of frauds, he having been convicted and whipped for petty larceny. THE COURT determined that he was not, because both his crime and his punishment were infamous; but they laid it down as a rule, that it is the crime which creates the infamy, and takes away a man's competency, and not the punishment for it. *Pendock* v. *Mackender*, 2 Wils. 18. See also 5 Mod. 75. But by the statute 31 Geo. III. c. 35. it is enacted that no person shall be an incompetent witness by reason of a conviction for petty larceny.

THE KING *against* JOHN THOMPSON.

CASE CCV.

Goods privately stolen from the person of a captain of a ship while he is asleep in his cabin, is within the 8 Eliz. c. 4. S. C. 2 East, 705.

AT the Lent Assizes for *Newcastle* in the year 1787, *John Thompson* was indicted before MR. JUSTICE HEATH, on the statute 8 Eliz. c. 4. for stealing a silver watch, the property of *Jonathan Simpson*, privately from his person and without his knowledge.

IT appeared in evidence, that the prisoner had stolen the watch mentioned in the indictment from the person of the prosecutor, a master of a ship then lying in the river *Tyne*, while he was asleep in his cabin, privately, and without his knowledge.

See Gribble's Case, *ante*, p. 240, Case 120.

THE Jury found the prisoner guilty of the offence as laid in the indictment, and the learned Judge passed sentence of death upon him; but the Counsel for the prosecution having very candidly produced a case decided at *Durham* some years ago, where it was *ruled* that the statute does not extend to

1787.

THOMPSON'S CASE.

protect persons asleep, the execution of the sentence was respited, and the case reserved for the opinion of the TWELVE JUDGES.

THE TWELVE JUDGES were all present, and ELEVEN of them were of opinion (*a*), That the conviction was right.

(*a*) Upon the first consultation LORD LOUGHBOROUGH, ASHHURST, HOTHAM, BULLER and HEATH, Justices, held the conviction to be proper against the other four for the reason mentioned in Branney's Case, 2 East, P. C. 704. and so the case was adjourned to Hilary Term 1787, and again to Easter Term succeeding, when ALL THE JUDGES agreed that the conviction was proper. 2 East, 705. and see Willan's Case, *post*, Old Bailey June Session 1788, accordant.—But see now 48 Geo. III. c. 129. by which 8 Eliz. c. iv. is repealed, and it is re-enacted "that every person who shall, at any time or in any place whatever, feloniously steal any money, goods or chattels, from the person of any other, whether privily without his knowledge or not, but without such force or putting in fear as is sufficient to constitute the crime of robbery, or who shall be present aiding or abetting therein, shall be transported for seven years, or imprisoned not exceeding three years, &c."

CASE CCVI.

THE KING *against* JOHN AND MARY HAMMOND.

What shall be considered as "*sending* a threatening letter, *knowing* its contents," within the meaning of the statutes creating that offence.

S. C. 2 East, 1119.

AT the Old Bailey in May Session 1787, *John Hammond* and *Mary Hammond* his wife, were indicted before MR. JUSTICE ASHHURST, present MR. BARON PERRYN, on the statutes 9 Geo. I. c. 22. and 27 Geo. II. c. 15. for sending a threatening letter to *Daniel Dancer*, demanding the sum of ten pounds.

THE indictment consisted of twelve counts, some of which charged, that the prisoners *sent* and *delivered* the said letter: and others, that they caused it to be *sent* and *delivered*.

IT appeared in evidence, that *Mary Hammond* had *written* the letter in question; and that it was *delivered* to the prosecutor by *John Hammond*, who said he had found it in the prosecutor's garden. The prisoners were husband and wife, and they lived in the prosecutor's house in the character and

1787.

HAMMOND'S CASE.

capacity of servants; but there was no evidence that *John Hammond* had any knowledge of the contents of the letter.

THE 9 Geo. I. c. 22. enacts, "That if any person or persons shall knowingly *send* any letter without any name subscribed thereto (*a*), or signed with a fictitious name or names, demanding money, venison, or other valuable thing (*b*), such offender shall suffer death without benefit of clergy."

THE 27 Geo. II. c. 15. enacts, "That if any person or persons shall knowingly *send* any letter without any name subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to kill or murder any of his Majesty's subjects, or to burn their out-houses, barns, stacks of corn or grain, hay or straw, though no money or venison, or other valuable thing, shall be thereby demanded, every such offender shall suffer death without benefit of clergy."

IT is also enacted by 30 Geo. II. c. 24. "That all persons who shall knowingly *send* or *deliver* any letter or writing with or without a name or names subscribed thereunto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or other *infamous* punishment, with a view or intent to extort or gain money, goods, wares, or merchandises (*c*), from the person or persons so threatened to be accused, shall be deemed offenders against law and the public peace; and the Court before whom he shall be convicted, may order such offender to be fined and imprisoned; or put in the pillory; or publicly whipped; or to be trans-

(*a*) A threatening letter, in which the writer makes himself known to the person to whom it is sent, either from its hand-writing, or by the subject of its contents, though not signed by the writer in any name, is not within the 9 Geo. I. or 27 Geo. II. for by making himself known in the letter, it is the same thing as if he had signed his name to it, Rex *v.* John Heming, Warwick Summer Assizes 1799. before CHAMBRE B. 2 East, 1116.

(*b*) See Major's Case, Old Bailey, June 1796, *post*.

(*c*) But by 52 Geo. III. c. 64. the provisions of this statute are extended to "any bond, bill of exchange, bank-note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money, or delivery or transfer of goods or other valuable thing."

1787. ported according to the laws made for transportation of *felons.*"

HAMMOND'S CASE.

Mr. Shepherd, Mr. Schoen.

THE Counsel for the prisoner submitted to the Court, That the offence described by the statutes 9 Geo. I. c. 22. and 27 Geo. II. c. 15. on which the indictment was founded, consisted in "*knowingly sending*" a threatening letter; but that the evidence only proved that *Mary Hammond* had *written* the letter in question, and that *John Hammond* had *delivered* it; and that there was no proof whatever of its having been in any way whatever *sent* to the prosecutor.

THE JUDGES thought the objection, as to the definition of the offence, well founded. In all cases, they said, so highly penal as the present case is, it is certainly necessary not only to consider the intention of the Legislature, but to bring the offender within the words of the Act of Parliament itself. The act of merely *writing* a threatening letter will not constitute this offence; for unless the writer or contriver of such a letter afterward *send* it to the party whose fears the threat it contains was calculated to alarm, it cannot possibly produce the mischief which the Legislature intended alone to suppress; and they have accordingly adapted the words of both the statutes to that exigency, *viz.* "if any person shall *send* any such letter, he shall be guilty of felony," &c. Now it is impossible to conceive, that *carrying* a letter can by any construction be comprehended under the words "*send* any letter," which are the precise terms in which the statutes are penned. There can be no doubt, however, if the Legislature at the time they passed these Acts, had been asked, Whether the "*carrying* a threatening letter," or, to make it more like the present case, "*delivering* a threatening letter," was an offence which they meant to punish, and of the same kind as that which they had described by the words "*sending* a threatening letter," but that they would have answered without doubt or hesitation in the affirmative. The JUDGES, however, are not to consider what the Legislature would have done in certain cases, but to look at the words they have used, and to construe them according to the meaning which it is most likely they entertained at the time the subject was under their consideration. Now at the time these statutes

1787.

HAMMOND'S CASE.

passed, it seems that the Legislature never had it in contemplation that any person would be the *carrier* of a threatening letter which he himself had written or contrived. They undoubtedly conceived that such a letter would be *sent* by the post (*a*), or by some other *secret* conveyance, so as to prevent the object of it from discovering the person from whom it was sent. It is clear therefore that the act of *delivering* a threatening letter is not the offence described in the statutes of 9 Geo. I. c. 22. and 27 Geo. II. c. 13. But if any doubt could be entertained upon this subject, the Legislature itself has removed it; for by a subsequent Act of Parliament, 30 Geo. II. c. 24. the offence of *delivering* as well as *sending* a threatening letter is made a *misdemeanour*, punishable in the discretion of the Court, according to the circumstances of the case. This statute makes it evident, that where the Legislature intended that a particular act should become an essential ingredient in creating the offence, they knew how to make use of proper words to express that intention; and affords incontrovertible proof, that they had it not in contemplation to make the *delivery* of a threatening letter *felony*, at the time the statutes on which the present indictment is founded were passed. But there is still a question in this case for the consideration of the Jury; for though *Mary Hammond* is the wife of the other prisoner, yet if the Jury are of opinion that she wrote the letter herself, without any interference of her husband, and *sent* it by him, without his knowing any thing of the contents, to the prosecutor, she alone may be found *Guilty*; but otherwise, both the prisoners must be acquitted.

THE learned Judge left it accordingly to the Jury, and they found both the prisoners *Not Guilty*.

(*a*) See Girdwood's Case, Old Bailey February Session 1776, *ante* page 142, Case 76.

1787.

CASE CCVII.

THE KING *against* JOHN COOGAN.

In an *indictment* for forging a *will*, a variance between the will recited, in the pronoun "I," and that produced in evidence, is fatal.

AT the Old Bailey in May Session 1787, *John Coogan* was indicted on the statute 2 Geo. II. c. 25. (*a*), for knowingly uttering and publishing as true, a certain false forged *Will and Testament*, purporting to be the last Will and Testament of *James Gibson*, late a seaman belonging to a merchant vessel, &c.

THE Will produced in evidence began thus: "*James Gibson* do hereby," &c. leaving out the pronoun of the first person. The Will recited in the indictment began with the pronoun, "I *James Gibson*, do hereby," &c.

THE COURT held this variance fatal to the validity of the indictment, and the prisoner was of course *acquitted*.

(*a*) The reason of this indictment being on 2 Geo. II. c. 25. instead of 31 Geo. II. c. 10. s. 24. is, that *Gibson* was not a seaman on board a *King's ship*, but on board a *letter of marque* in the merchants' service.—And see 41 Geo. III. c. 39. by which the statutes 2 Geo. II. c. 25. 7 Geo. II. c. 22. and 15 Geo. II. c. 13. are altered and extended.

CASE CCVIII.

THE KING *against* JOHN COOGAN.

A prisoner acquitted of forgery on a variance between the instrument produced in evidence and that recited in the indictment, cannot plead *autrefois acquit* to another indictment for the same offence, except the instrument be again misrecited in the same manner.

IN the July Session following *John Coogan* was again indicted before MR. JUSTICE WILSON, present MR. SERJEANT ADAIR, Recorder, for falsely uttering and publishing as true a certain false, forged, and counterfeited *Will and Testament*, with a certain mark thereto set, purporting to be the last Will and Testament of *James Gibson*, late a seaman on board the *Vigilant*, &c. which said false, forged, and counterfeited Will and Testament is in the words and figures following; that is to say, "*James Gibson* do hereby," &c. leaving out the pronoun "I," and reciting a *fac-simile* of the Will.

THE prisoner being put to the bar, on his arraignment pleaded *autrefois acquit*. The plea was taken *ore tenus*, and

recorded by the Clerk of the Arraigns; who replied to it, on the part of the Crown, *nul tiel record.* 1787.

COOGAN'S CASE.

To prove THE PLEA, the record of the prisoner's acquittal in May Session was produced. On comparing it with the present indictment, it appeared, as above stated, that the prisoner had been acquitted of uttering a forged Will, beginning, " I *James Gibson* do hereby," &c. but that he was now indicted for uttering a forged Will, beginning " *James Gibson* do hereby," &c. The question therefore was, Whether this record was legal evidence of his having been acquitted of the *same offence?*—And after argument by the prisoner's Counsel, in which he chiefly relied upon Lord *Hale's* (1) construction of *Vaux's Case*, as reported by Lord *Coke* (2), THE COURT rejected the proof as insufficient; and the prisoner pleaded the general issue, over to the felony, and the Jury found him *Guilty* of the offence.

(1) 2 Hale, 246.
(2) 4 Co. 44. Co. P. C. 214.

THE KING *against* JOHN COOGAN. CASE CCIX.

(Continued.)

DURING the course of the trial, *James Gibson*, the supposed testator of the forged Will, was produced and sworn as a witness on the part of the Crown. Upon this circumstance a doubt arose, whether the prisoner had been legally convicted; the indictment charging him with having uttered or published as true a certain false *Will and Testament* of one *James Gibson*, &c.; and there being no such instrument, in contemplation of law, as the *Will and Testament* of a man who is living (for until the death of a testator his Will cannot exist in contemplation of law), it cannot be a case within the statute 2 Geo. II. c. 25. for there cannot be a forgery of a thing which neither does or can exist at the time the forgery is alleged to have been committed. Upon this doubt the judgment was respited, and the case referred to the consideration of the JUDGES.

A person may be indicted for forging a last will and testament, although the supposed testator is alive.
S. C. 2 East, 1001.

1787.

COOGAN'S CASE.

S. C. 2 East, 949, says in Michaelmas Term 1787, all the JUDGES held the conviction proper.

IN June Session 1787, the prisoner was put to the bar, when MR. JUSTICE WILSON delivered the opinion of the JUDGES to the following effect.—Upon the trial of this indictment it appeared that *James Gibson*, whose Will was charged to be forged, was alive, and appeared as a witness; and I entertained some doubt, whether, under these circumstances, an instrument bearing the similitude of a last Will could be considered within the meaning of the statute upon which the indictment is founded. The case was laid before the TWELVE JUDGES, and on mature deliberation they have decided, that the doubt was without foundation. The fact of the prisoner's having uttered this Will, knowing it was forged, was very clearly proved at the trial. He told the Proctor, that *James Gibson*, the supposed testator, was dead, and produced a letter to the same effect to corroborate the assertion; by which means he obtained a probate as the executor named in the Will. The instrument which the law takes notice of under the name of a *Will*, is in a man's own power during his life, and therefore no instrument or writing is considered as a last Will until the testator is dead. But it exists as a Will during his life-time, although it do not take effect until after his death.—And THE JUDGES are all of opinion, that if a forged instrument, *purporting* on the face of it to be a last Will and Testament, be uttered and published as a true last Will and Testament, under circumstances manifesting an intention to defraud, it is equally within the meaning of the Act of Parliament, whether the supposed testator be in fact alive or dead; for the objection is only applicable to the effect which a Will has in law, and not to the fact of making it: a contrary doctrine would operate as a repeal of the law; for if the act of making the Will were not forgery at the time, a publication afterwards would not make it so. This opinion is founded on the authority of several cases. *Sir Edward Coke* in his third Institute, says, that if one who writeth the Will of a sick person, inserts therein a clause concerning the devise of lands falsely, without any warrant or direction of the devisor, albeit he did not forge or falsely make the whole Will, yet he

See Birch and Martin's Case, *ante*, page 79, Case 44.

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COOGAN'S CASE.

is punishable by the statute 5 Eliz. c. 14; the words of which are the same to this purpose as those of the 2 Geo. II. c. 25. In the year 1753, *Timothy Murphy* (1) was tried in this Court, for forging a Seaman's Will; and though the man whose Will was forged was alive, he was convicted and executed. In the year 1773, *John Stirling* (2), a student in the Temple, was tried in this Court for forging a Will in the name of his Laundress, by which means he obtained a considerable sum of money which was invested in her name in the public funds; and he was convicted and executed, though the Laundress was then alive. In the year 1754, *Anne Lewis* (3) was indicted upon this statute for uttering and publishing as true a forged Power of Attorney from *Elizabeth Tingle*, Administratrix of her father *Richard Tingle*, deceased, a Marine on board the Hector: It appeared that *Richard Tingle* had died childless; and a doubt was conceived, Whether, since there never was such a person as *Elizabeth* the daughter of *Richard Tingle*, the offence was forgery within the meaning of the statute: and ELEVEN of the JUDGES were of opinion, That as the instrument forged wore the appearance of a Power of Attorney, it was within the Act, notwithstanding the deed which she had published was impossible to be true. There is also another case, *The King* v. *Bolland* (4), an indictment in this Court for forging the indorsement on a promissory note in the name of "*James Banks*," whom he represented as a Wine and Brandy Merchant, living in *Rathbone-place*; but in fact no such person ever existed: and, upon the opinion of the JUDGES being taken, *Bolland* was executed.

(1) Reported, 10 St. Tr. 183.

(2) *Ante*, p. 99, Case 57.

(3) Reported in Foster, p. 116.

See the Case of Eliz. Dunn, *ante*, page 57, Case 32.

(4) *Ante*, p. 83, Case 47.

THE prisoner, in consequence of this determination, received judgment of death.

THE KING *against* ELIZABETH STEEL.

CASE CCX.

AT the Old Bailey in May Session 1787, the Grand Jury found a bill of indictment against *Elizabeth Steel* for simple grand larceny. On her arraignment she refused to plead.

A prisoner mute by the visitation of God, may be arraigned, tried, sentenced, and transported.

1787. STEEL'S CASE.

The Court directed the Sheriff to return a Jury *instanter*, and they were sworn to inquire whether she stood mute of malice, or by the visitation of God (*a*). The Jury returned a verdict, "Mute by the visitation of God." The prisoner was remanded, and the question referred to the consideration of the JUDGES, Whether, under these circumstances, she could be tried upon the indictment?

Bro. Cor. 101. 217. 8 Hen. 4. pl. 2. 43 Ass. pl. 30. Cromp. J. 290. 1 Hale 34, 35. 2 Hale 317.

MR. JUSTICE GOULD in the September Session following, said that THE JUDGES in *Trinity Term* had assembled at *Serjeants'-Inn Hall* to consider of this case, and that they were of opinion, That the verdict finding the prisoner to be "mute by the visitation of God" was not an absolute bar to her being tried upon the indictment; for although a person *surdus et mutus à nativitate* is, in contemplation of law, incapable of guilt, upon a presumption of ideotism, yet that presumption may be repelled by evidence of that capacity to understand by signs and tokens, which it is known that persons thus afflicted frequently possess to a very great extent; That great diligence and circumspection, however, ought to be exercised in so critical a case; and that if all means to convey intelligence to the mind of such a prisoner respecting the nature of the arraignment should prove ineffectual, the Clerk of the Arraigns may enter the plea of NOT GUILTY for the prisoner: and then it becomes the duty of the Court to inquire touching all those points of which the prisoner might take advantage herself; to examine all the proceedings

(*a*) See the Case of Francis Mercier, Old Bailey, December Session 1777, *ante* page 183, case 92. and the 12 Geo. III. c. 20.

(*b*) At the Old Bailey in December Session 1778, *Thomas Jones* was tried before MR. JUSTICE BLACKSTONE for stealing five guineas in the dwelling-house of *John Goldwell*: on his being put to the bar for arraignment he appeared to be quite deaf and dumb; and on a Jury being sworn he was found "mute by the visitation of God" but, it appearing that he was in the daily habit of receiving and communicating information with a *Fanny Lazarus* by means of certain signs and tokens, she was sworn well and truly to interpret, &c. and he was arraigned, tried and convicted of the simple larceny and received sentence of transportation for seven years.

against her with a critical eye; and to render her every possible service consistent with the rules of law. 1787.

STEEL'S CASE.

In the October Session following the prisoner was again put upon her arraignment before Mr. Justice Heath. On being asked by the Clerk of the Arraigns, Whether she was *Guilty* or *Not Guilty?* she replied, "You know I cannot hear."

Mr. Justice Heath, upon a supposition that she could hear, said:—Your case has been considered by all the Judges, and they are of opinion that, even if you cannot hear, you ought to be tried upon the indictment; it will therefore be in vain for you to attempt to elude arraignment by pretended deafness; for as you must at all events be tried for the felony, you will lose, by such pretence, the advantage of asking proper questions of the witnesses." But all endeavours proving ineffectual, a Jury was again returned, and sworn "well and truly to inquire, whether *Elizabeth Steel*, the prisoner at the bar, stands mute through wilfulness and obstinacy, or by the visitation of God." And the Jury again found a verdict, "Mute by the visitation of God." The same Jury were immediately sworn in chief, and charged to try the indictment; and, after hearing the evidence, which was very clear, they found the prisoner Guilty; and at the close of the session she received sentence of transportation for the term of seven years (*a*).

(*a*) Lord Hale says, "But what if all this be found against the prisoner, what shall be done? Whether judgment of *death* shall be given against him, though *he* never pleaded, seems yet undetermined." 2 vol. 317. See also Sir Will. Blackstone's Commentaries, 4 vol. 325, and the statute 12 Geo. III. c. 20. by which it is enacted, that if any person, being *arraigned* on any indictment for felony or piracy, shall stand mute, or will not answer directly to the felony or piracy, such person shall be convicted of the charge, and the Court shall thereupon award judgment and execution.

1787.

CASE CCXI.

THE KING *against* THOMAS REILLY.

A convict on the 31 Geo. II. c. 10. for taking a false oath, &c. who is pardoned before judgment, is a competent witness against the person who suborned him to take such oath; for by the allowance of the pardon he is restored to his former competency and credit.

THE statute 31 Geo. II. c. 10. s. 24 (*a*). enacts, "That whosoever shall willingly and knowingly take *a false oath*, or procure any other person to take a false oath, to obtain the probate of any will or wills, or to obtain letters of administration in order to receive the payment of any wages, pay, or other allowances of money, or prize-money, due, or that were supposed to be due, to any officer, seaman, or other person intitled, or supposed to be intitled, to any wages, pay, or other allowances of money, or prize-money, for services done on board any King's ship or vessel, who has really served, or was supposed to have served on board any King's ship or vessel, every such person so offending shall be deemed guilty of *felony*, and shall suffer death as a felon, without benefit of clergy."

AT the Old Bailey in July Session 1787, *John Macdaniel* was CONVICTED on this statute before MR. SERJEANT ADAIR, *Recorder*, for taking *a false oath*, "That one *James Lewis*, a Seaman on board his Majesty's ship the *Hannibal*, died a bachelor, intestate, and without a parent, and that he, *John Macdaniel*, was his lawful brother, and next of kin," with intent to obtain letters of administration to the goods and chattels of the said *James Lewis*, *&c.* In the course of the trial it was discovered, that a person of the name of *Thomas Reilly*, who appeared as a witness, had taken advantage of the prisoner's ignorance, and had suborned him to commit the offence. *Thomas Reilly* was accordingly committed to take his trial at the next Session, and no judgment was passed upon the prisoner, *John Macdaniel*.

IN the September Session following, on the trial of the indictment against *Reilly*, for procuring *John Macdaniel* to take the said false oath, *John Macdaniel* was produced as a witness on the part of the Crown.

(*a*) See 32 Geo. III. c. 33. s. 23. 32 Geo. III. c. 34. s. 8 & 29. 32 Geo. III. c. 67.

1787.

REILLY'S CASE.

THE Counsel for the prisoner produced the record of *Macdaniel's* conviction in the July Session preceding, and submitted to the Court, that his competency was thereby destroyed, notwithstanding the conviction had not been yet followed by a judgment. (2) But the Counsel for the Crown waived the argument upon this point; and on *Macdaniel's* being called upon to say why the Court should not give him judgment to die, according to law, he pleaded his Majesty's pardon in bar, and it being regularly allowed, he was admitted to give evidence, and the prisoner was convicted (*a*).

Mr. Shepherd, Mr. Garrow. Mr. Silvester, Mr. Fielding.

(2) See Cowper's Rep. 3.

THE question therefore was, Whether a special pardon granted after a conviction on *this statute*, but pleaded and allowed in bar of the judgment, restored the witness to his competency? or, Whether it only remitted him from the punishment to which he would have been liable in consequence of an attainder?

IN favour of the prisoner it was contended, that as a pardon, by the particular manner in which it is penned, merely imports an intention on the part of the King to discharge the party from future punishment, it was to be considered as *a charter of remission* only; and could not, by consequence and deduction, be considered as *a charter of restoration*, so as to remove the disability to which the witness had once been rendered liable, and enable him thereby to prejudice the interests of third persons, by giving evidence against them.

5 Mod. 15.

ON the part of the Crown it was contended, that the King's pardon not only remits the punishment, but restores the convict to his *plenam et liberam legem* (*b*).

4 Hawk. ch. 33. s. 152.

(*a*) It was contended on the part of the crown that the bare production of the record of *Macdaniel's* conviction was of itself sufficient evidence that he had in fact taken the false oath as alleged in the indictment. But it was insisted for the prisoner that the record was not of itself sufficient evidence of the fact; that the Jury had a right to be satisfied that such conviction was right; that *Reilly* had a right to controvert the guilt of *Macdaniel*; and that the evidence given on *Macdaniel's* trial ought to be submitted to the consideration of the present Jury: and THE RECORDER obliged the counsel for the crown to go through the whole case in the same manner as if the Jury had been charged to try *Macdaniel*.

(*b*) It is said by Lord Hale that if the King pardon these offenders they

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REILLY'S CASE.

THE COURT were clearly of opinion, That in cases of felony a pardon from the Crown restores the competency of the convict; and that the verdict against *Macdaniel* was to be considered as a conviction of a *felony* committed through the medium of perjury, and not as a conviction of *perjury* itself. The testimony of *Macdaniel* was accordingly received in evidence, and the Jury acquitted *Abraham Davis*, and found *Thomas Reilly* guilty of the *offence* with which he stood charged in the indictment. But the judgment was respited, and the case submitted to the consideration of the TWELVE JUDGES.

MR. JUSTICE WILSON in June Session 1788, after stating the particulars of the case as above recited, delivered the opinion of the JUDGES to the following effect.—The learned Judge who tried this indictment entertained some doubt respecting the competency of *Macdaniel*'s testimony. The case was accordingly reserved for the consideration of the JUDGES; and they are of opinion, That if *Macdaniel* had not received his Majesty's pardon, some doubt might have been entertained; but as he was pardoned, and that pardon regularly allowed, they are clear that it not only respites the convict from punishment, but entirely absolves him from the crime, and restores him completely to his former competency and credit. The case of *Cuddington* v. *Wilkins*, in Ld. Ch. Justice Hobart's Reports, is precisely in point, and decisive of the question; for it is there expressly determined, that the King's pardon doth not only clear the offence itself, but all the dependencies, penalties, and *disabilities* incident to it. The JUDGES therefore are of opinion, That the testimony of *Macdaniel* was properly admitted in evidence; and that *Thomas Reilly*, the prisoner at the bar, has been legally convicted on this indictment.

Hob. 67. 82. Raym. 369. 5 Co. 110. 5 Mod. 15. 3 Lev. 426. Salk. 689.

THE prisoner received sentence of death.

are thereby rendered competent witnesses, though their credit is to be still left with the Jury, for the King's pardon takes away *pœnam et culpam in foro humano*; but yet it makes not the man always an honest man, and therefore he shall not be a Juryman, and cites the Case of Cuddington v. Wilkins, in Hob. 67. 81.

1787.

THE KING *against* HENRIETTA RADBOURNE. CASE CCXII.

A person indicted of *petty treason* and *murder*, combined in one count, may be found guilty of the murder, and acquitted of the treason.

S. C. 1 East, 339, 356. 1 Hale, 184. 292. Foster, C. L. 104.

AT the Old Bailey in July Session 1787, *Henrietta Radbourne* was tried before MR. JUSTICE WILSON, present JAMES ADAIR, Esq. Recorder, on an indictment consisting of one count only; which charged, that "*Henrietta Radbourne*, late of the parish of *St. Mary-le-bone*, in the county of *Middlesex*, widow, late servant of *Hannah Morgan*, widow, her mistress, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, contriving and intending her the said *Hannah Morgan*, her mistress, to deprive of her life, and feloniously and traitorously to kill and murder on the 31st May, in the 27th year, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said *Hannah*, the mistress of the said *Henrietta*, feloniously, traitorously, wilfully, and of her malice aforethought, did make an assault; and that the said *Henrietta*, with a certain stick having a bayonet fixed at the end thereof, of the value of two shillings, which stick she, the said *Henrietta*, in both her hands then and there had and held, in and upon the top of the head of her the said *Hannah*, did then and there feloniously, traitorously, wilfully, and of her malice aforethought, her the said *Hannah Morgan* strike, cut, stab, and penetrate, giving to the said *Hannah*, by such striking, cutting, stabbing, and penetrating of the said *Hannah*, with the bayonet so fixed at the end of the stick aforesaid, in and upon the top of the head of her the said *Hannah*, one mortal wound, of the length of one inch and of the depth of half an inch, of which mortal wound the said *Hannah*, from the said 31st May in the year aforesaid, until the 11th day of July in the year aforesaid, in and at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 11th day of July in the year aforesaid, at the parish aforesaid, in the county aforesaid, of the mortal wound aforesaid, she the said *Hannah Morgan* died: And so the Jurors aforesaid, upon their oath aforesaid, do

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RADBOURNE'S CASE.

say, that the said *Henrietta Radbourne*, otherwise *Henrietta Gibbons*, her the said *Hannah Morgan*, her said mistress, in manner and by the means aforesaid, feloniously, traitorously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our said Lord the King, his crown and dignity."

THE Coroner's Inquisition was for murder generally.

An information before a Justice, made by the deceased on oath, in the presence of the prisoner, may be given in evidence on the trial, though the informant was not apprehensive of death, and though the information be signed by one magistrate only. S. C. 1 East, 356.

Mrs. *Morgan*, the unfortunate victim of the prisoner's avarice and rapacity, was an elderly lady who lived in *George-street* near *Manchester-square*, and who was supposed to be possessed of a large sum of money and other valuable property. Being in want of a servant, she applied in the month of May 1787 to an office for hiring servants, and soon afterwards, the prisoner was sent to her with a written character so highly in her favour, that Mrs. *Morgan* was induced to admit her immediately into her service, but her conduct was so different from the character she was described to possess, and indeed it had been written by her *father* in the character of her *master*, that her mistress was soon obliged to give her warning, and to seek out for another servant to supply her place. On the evening of the 31st May, between the hours of twelve and one, Mrs. *Morgan* desired the prisoner to go to bed, but instead of obeying her commands, she loitered about the house; and about half past one, while her mistress was undressing, went into the bed-room, and during some desultory conversation asked her if she had said her prayers, but Mrs. *Morgan* conceiving it to be only matter of impertinence, although it was the first time she had ever made such an enquiry, desired her to mind and say her own prayers and go to bed. She accordingly retired; and her mistress having, as she supposed, fastened the night-bolt of her bed-room door, which appeared to her to go very hard into the socket, and which had been prevented by some person from receiving the bolt, retired to rest without the least suspicion of there being any design in the mind of the prisoner to destroy her life. Scarcely, however, had she been in bed one hour, before she was awakened from her sleep by repeated blows and stabs about her head and neck; and jumping up she ran, with vio-

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lent outcries of fire and murder, into a back-room on the same floor. Her continued cries alarmed the watch and neighbourhood, and on entering the house she was found, amidst a profusion of blood, to have received five large wounds on her head, two on the top, one on the left side, and two on the right side, in three of which the scull was laid quite bare; a large wound on the back part of her right hand; and several very bad bruises on her elbows and her left hip. On the right hand side of the fire-place in the bed-room was found a long stick with an iron head, that had a tuck coming out of the stick, with a bayonet at the other end, upon the point of which there were several grey hairs, resembling those on Mrs. *Morgan*'s head; but there was no other person found in the house except Mrs. *Morgan* and her maid, nor were there any means discovered by which another person (had any been there) could have escaped, excepting through the front parlour window, the sash of which was up about eight inches, and through which a neighbour got, for the purpose of opening the door for the watchmen, when the alarm was given. About three o'clock in the morning of the 31st May, the wounds and bruises were examined by Mr. *John Heaviside*, a surgeon of great skill and eminence in his profession; and, though on removing the scalp and the covering of the skull there was no appearance of fracture, he declared that from the wounds and bruises her life was in great, though not immediate danger. While she languished in this state, she was visited by *James Crofts*, Esq. and Sir *Robert Taylor*, two magistrates for the county of *Middlesex*, and on the 9th June 1787, she was carried to the Public Office, where Mr. *Crofts*, in the presence of the prisoner, took down her *deposition* and the depositions of *Henry Holmes* and *Rebecca Holmes*, in writing, stating in substance the circumstances above described. The whole of this examination, Mr. *Crofts* declared on his oath, was heard by the prisoner; that the depositions were distinctly read over to her in the presence of Mrs. *Morgan*; that they were signed by Mrs. *Morgan* and the other deponents in his presence; that they contained correct accounts of what each deponent had said; and that he *signed* them, as having been taken before him as a magistrate for the county. The situa-

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tion of Mrs. *Morgan* continued nearly the same for about three weeks after these depositions were made, when symptoms appeared of matter being formed in her brain, and upon trepanning that part of the skull which the wounds had left bare, great quantities of matter were found immediately under the wounds; and after languishing for two days, during which she became paralytic, she died on Wednesday morning the 11th July. On opening the head it was discovered that the brain was putrefied, and there was no doubt, but that the wounds and bruises she received had brought the brain into this diseased state, and occasioned her death. The two deponents, *Henry Holmes*, who was a chairman in *Duke-street*, near *Manchester-square*, and *Rebecca* his wife, were acquaintances of the prisoner both before and after she went to live as a servant with Mrs. *Morgan*; and on the morning of the trial, Mr. *Heaviside*, the surgeon, visited the prisoner in Newgate, with a view of learning from her whether any other person had been concerned in this horrid transaction, when she told him, that she had let *Holmes* and his wife into the house through the window of the front parlour, and that it was they who had given her mistress the mortal wounds, and immediately escaped; but it appeared, that there had been a violent quarrel between the *Holmes* and the prisoner, on account of their having refused to carry messages for her to the man whose name she had assumed, and with whom she had been connected, but who had abandoned her on account of her bad character, and disposition to tell lies: and, indeed, both *Holmes* and his wife, who were examined as witnesses on the trial, not only denied the fact, but appeared free from all imputation.

GARROW, *for the Crown*, in opening this Case to the Jury, contended that Mrs. *Morgan*'s deposition was admissible in evidence upon the one of two grounds; FIRST, as *the declaration* of a person who had received a mortal wound from the hand of a murderer, and who was, at the time the declaration was made, lingering under a well-founded apprehension that her life was in imminent danger; for that a declaration made under such circumstances, by a person who was sensible she was about soon to give an account at the high tribunal of the Almighty, of the truth or falsehood with which it was

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made, was considered by the law to be made under a sanction more awful and impressive than that of an oath itself. SECONDLY, that if the circumstances of her health at the time were such as would not render the deposition admissible on this ground, it was admissible as *an information* taken by a regular magistrate, under the statutes of *Philip & Mary*; for it had been given in the presence and hearing of the prisoner, upon an oath lawfully administered to Mrs. *Morgan*, who had thereby called God to witness that what she said was true, and who had in the presence of the prisoner, made an additional attestation of its truth, by putting her signature thereto; for that any thing that was said, either by a prosecutor, a prisoner, or a witness, in the presence and hearing of each other, although said in common conversation and under no solemnity, was admissible evidence in all Courts both criminal and civil; and the circumstance of Mrs. *Morgan*'s testimony before the magistrate, in the presence of the prisoner, having been *reduced into writing*, instead of destroying its admissibility rendered it more eligible, inasmuch as what was said was thereby rendered more certain, and less liable to be mistaken.

THE COURT received the deposition in evidence (1); but the fact having been committed at the dead of night, there was no *positive* evidence, either by the contents of this information, or by the several witnesses who were examined *vivâ voce*, that the prisoner was guilty.

(1) See the case of *W. Woodcock*, post. Dec. Sess. 1788.

THE evidence, however, though entirely *circumstantial*, was extremely strong; but as there was not any set of circumstances proved by two witnesses, the learned Judge thought the prisoner could not be legally convicted of the charge of *petit treason* (*a*), the statute 1 Edw. 6. c. 12. s. 22. providing, that no person indicted for treason, *petty treason*, or misprision of treason, shall suffer any pain of death unless the offender be accused by *two sufficient and lawful witnesses*; and this being confirmed by the statutes 5 & 6 Edw. 6. c. 11.

(*a*) It is said that many of the JUDGES, on consulting on this case, observed that the statutes of Philip and Mary do not extend to treason.

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RADBOURNE'S CASE.

s. 12. which not only requires, that no person shall be condemned of petty treason, unless he be thereof accused by two lawful accusers; but that the said accusers shall, *if then living*, be brought in person before the party so accused, and avow what they have to say against him; and these statutes not being repealed by the 1 & 2 Phil. and Mary, c. 10. which orders that all trials of treason shall be according to the course of the common law (*a*).

THE JURY found the prisoner *guilty*, both on the indictment and inquisition, of the murder only; and the verdict was entered upon the record, "*Jury say* GUILTY *of the wilful* "*murder, but* NOT GUILTY of the treason."

THE judgment was respited upon this conviction, and three questions were submitted to the consideration of the TWELVE JUDGES.

See Cro. Car. 532. 1 Com. Dig. 366.368.

FIRST, Whether a prisoner can be convicted of murder upon an indictment or inquisition for petty treason? THAT IS, whether the acquittal for the petty treason does not involve in it an acquittal of the murder also?

SECONDLY, Whether the information of *Hannah Morgan*, the deceased, authenticated by one witness only, was legally received in evidence on an indictment for petty treason?

THIRDLY, Whether the information of *Hannah Morgan* was admissible in evidence, she not appearing, at the time she gave it, to be apprehensive of her approaching dissolution?

MR. RECORDER, on the first day of the December Session following, reported, that it was the unanimous opinion of ELEVEN JUDGES, Lord *Mansfield* being absent, that the learned Judge did right in admitting the information of *Hannah Morgan* to be received in evidence, and that the prisoner was legally convicted of *murder* on the indictment and inquisition for *petit treason* (*b*).

(*a*) The statute of 7 & 8 Will. 3. c. 3. s. 2. requires two witnesses in high treason, or the misprision of such treason only; but see Hawk. P. C. Bk. 2. ch. 46. s. 6.

(*b*) Mr. Justice *Foster*, in considering the question, whether it may be

THE prisoner accordingly received sentence of death, and was executed. 1787.

RADBOURNE'S CASE.

THE KING *against* FORSGATE. CASE CCXIII.

AT the Old Bailey in October Session 1787, *Robert Forsgate* was tried before MR. JUSTICE HEATH for stealing a cloth coat, a linen shirt, a waistcoat, and other articles of wearing apparel, the property of *John Wilson.*

An indictment for stealing the wearing apparel of *a son*, who is an apprentice to his father, and furnished with his clothes in pursuance of his indentures, must lay them to be the property of *the son*, and not of *the father.* See 2 East's Pleas Crown, p. 654 acc.

IT appeared in evidence, that the wearing apparel had been furnished by *John Wilson* to his son *George Wilson*; that his son *George*, who was nineteen years of age, was bound an apprentice to him; and that by the indentures he was bound to find his said son and apprentice in board, lodging, clothing, &c.

THE COURT. The goods being laid to be the property of *John Wilson* renders the indictment defective; they are the property of his son; for he having been furnished with them pursuant to the conditions of the indentures, they are exclusively his own.

adviseable to proceed upon an indictment of *murder* against a person plainly appearing to be guilty of *petty treason*, says, "Put the case, that a person is brought to his trial upon an indictment for petit treason, and that one witness only can be produced, or that the prosecutor is not furnished with any evidence except the depositions taken before the coroner, or information taken on oath before Justices of Peace, pursuant to the statutes: and let it be supposed that these witnesses are living, but unable to travel, or kept out of the way by the procurement of the defendant. What is to be done in this case? Is the defendant to be acquitted of *the whole charge?* I think not. I think this evidence, though not sufficient to convict of *petty treason*, is still admissible evidence, and proper to be left to the Jury as upon a charge of *murder*; and the Jury, if they are satisfied, may find the defendant Guilty of *the murder*, and acquit him of the *treason.*" Foster's C. L. 328.—See also the opinion of SIR M. HALE, 2 H. H. P. C. 292. and of MR. JUSTICE WRIGHT and MR. JUSTICE FOSTER, in the case of Rex *v.* Swan and Jefferies. Foster's Cro. Law, 106. 10 State Trials, 86 accordant.

1787.

FORSGATE'S CASE.

THE Prisoner was accordingly acquitted. But he was again tried on an indictment, laying the clothes to be the property of *George Wilson*, and he was found *Guilty* and transported (*a*).

(*a*) At the Old Bailey, 1701, Tracy and Turton *Justices*, and Lovell *Recorder*, doubted whether the property of a gold chain which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But Tanner, an ancient Clerk of the Court, said, that it had always been usual to lay it to be the goods of the child in such case: and that many indictments which had laid them to be the property of the father had been ordered to be altered by the JUDGES; and Mr. East says that it is holden good either way.

CASE CCXIV. THE KING *against* JAMES ATWOOD *and* THOMAS ROBBINS.

If the Jury believe the testimony of an *accomplice*, they may convict of a capital offence, though such testimony stands totally uncorroborated.

AT the Summer Assizes at *Bridgewater* in the county of *Somerset*, in the year 1788, *James Atwood* and *Thomas Robbins* were tried before MR. JUSTICE BULLER for a robbery on the highway.

THE prosecutor deposed, That on the day laid in the indictment he was met by three men, who, after using him with violence, and threatening his life, demanded his money; and that in consequence of their threats he delivered to them the property mentioned in the indictment; but that it was so dark at the time, he could not swear that the prisoners at the bar were two of the men who robbed him.

AN ACCOMPLICE was, under this circumstance, admitted to give his testimony; and he deposed, That he and the two prisoners at the bar had, in the company of each other, committed this robbery.

THE JURY, upon the evidence of these two witnesses, found the prisoners GUILTY; but the judgment was respited, and the case submitted to the consideration of the TWELVE JUDGES.

ON the first day of Michaelmas Term 1788, the JUDGES

assembled at Serjeants' Inn Hall to consider of the propriety of this conviction. 1788.

ATWOOD AND ROBBINS'S CASE.

MR. JUSTICE BULLER at the next Spring Assizes, held at *Taunton*, ordered the two prisoners to be put to the bar; and addressed them, in substance, as follows: "PRISONERS, you were convicted of a highway robbery at the last Summer Assizes at *Bridgewater*; the material circumstances of the trial were these: The prosecutor gave in evidence, that he was robbed by three men on the day laid in the indictment, mentioning the conversation that passed during the robbery, and proving all the facts that are necessary in law to constitute that offence; but as it was dark, he could not swear to the person by whom it was committed. The accomplice was then called, who swore, That he and you had, in the company of each other, committed this robbery; and *he mentioned all the circumstances that passed, which exactly corresponded with those the prosecutor had before related.* On the testimony of these two witnesses the Jury found you GUILTY; but on a doubt arising in my mind respecting the propriety of this conviction, I thought it proper to refer your case to the consideration of the TWELVE JUDGES.—My doubt was, Whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction (*a*)?—And the Judges are unanimously of opinion, that an accomplice alone is a competent witness; and that, if the Jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal. The distinction between the *competency* and the *credit* of a witness has been long settled. If a question be made respecting his *competency*, the decision of that question is the exclusive province of the Judge; but if the ground of the objection go to his *credit* only, his testimony must be received and left with the Jury, under such directions and observations from the Court as the circumstances of the case

(*a*) See the case of Durham and Crowder, *Post* Old Bailey December Session 1787.

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ATWOOD AND ROBINS'S CASE.

may require, to say whether they think it sufficiently credible to guide their decision on the case. An accomplice, therefore, being a competent witness, and the Jury in the present case having thought him worthy of credit, the verdict of GUILTY, which has been found, is strictly legal, though found on the testimony of the accomplice only (*a*)."

HIS Lordship then passed sentence of death upon the prisoners; but intimated that it was his intention to recommend them to mercy.

(*a*) See the case of Jordaine *v.* Lashbrooke in the King's Bench in Easter Term, 38 Geo. III. 7 Term Rep. 609. where MR. JUSTICE GROSE cites and relies upon this case, saying, "This is not new law, nor founded upon a new principle: for in 1 Hale, 303, 304, and 305, there are different instances of convictions on the evidence of accomplices; one in 1672 of a conviction of *Hyde* and others of a robbery on the highway, on the testimony of one who was a party in the robbery, but not indicted." See also Durham's Case, Old Bailey, Dec. Session 1787, *Post*, and the Case of Rex *v.* Jones in B. R. Easter Term, 49 Geo. III. where the same objection was taken, and to which LORD ELLENBOROUGH, C. J. said, "No one can seriously doubt that a conviction is legal though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a Jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes. It is allowed that he is a competent witness; and the consequence is inevitable, that if credit be given to his testimony, it requires no confirmation from another witness. Within a few years a case was referred to the TWELVE JUDGES, where four men were convicted of a burglary upon the evidence of an accomplice who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the JUDGES were unanimously of opinion that the conviction as to all the four was legal, and upon that opinion they all suffered the sentence of the law. 2 Campbell's Rep. 132.

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THE KING *against* JUSTIN HARVEY. CASE CCXV.

AT *Chelmsford* Summer Assizes 1787, for the county of *Essex*, *Justin Harvey* was indicted before MR. JUSTICE GOULD, for that he, on the 9th September 1785, one horse, of the price of eight pounds, of the goods and chattels of *Aaron Patrick*, feloniously did steal, take, and carry away.

If a horse be *purchased*, and *delivered* to the buyer, it is not felony, though he *immediately* ride away with it, without paying the purchase-money. S. C. 2 East, 669.

THE prosecutor had sent his servant with the horse to *Harlowbush* fair, in order to sell it. The prisoner met the prosecutor, to whom he was personally known. "I hear," says the prisoner, "you have a horse to sell. I think he will suit my purpose; and if you will let me have him a bargain, I will buy him." The prisoner and the prosecutor walked together into the fair; and upon a view of the horse, the prosecutor said to the prisoner, "You shall have the horse for eight pounds;" and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor that he would return immediately and pay him. The prosecutor replied, "Very well, very well." The prisoner rode away with the horse, and never returned.

THE COURT. It is impossible by any construction whatsoever to make this case a felony. The case in *Kelynge's Reports* (1), where a man rides away with a horse which he had obtained on pretence of trying its paces, was a *conditional delivery*. *Major Semple's Case* (2), which is the most recent of the kind, and included in it a consideration of *the King* v. *Pear* (3), was a delivery for *a special purpose*, or rather a contract of unlimited duration. But in the present case the delivery was unconditional, and the contract was completed. It was a sale; and the *property* as well as the *possession* was entirely parted with. The prisoner has defrauded the prosecutor of *the price* of the horse, but not of the horse itself; and the only remedy the prosecutor has is by action to reco-

(1) Kely. 82.

(2) *Ante*, p. 420, Case 196.

(3) *Ante*, p. 217, Case 105.

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HARVEY'S CASE.

ver the eight pounds: but the prisoner cannot be indicted for a felony.

AND the prisoner was accordingly discharged (*a*).

(*a*) Wherever there is a real and *bonâ fide* contract and a delivery, and afterwards the goods are converted to the party's own use, that is not felony. But if there be no real and *bonâ fide* contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit felony. *Per* ASHHURST J. in Rex *v.* Pear.

CASE CCXVI. THE KING *against* GEORGE SADI AND WILLIAM MORRIS.

The word *chattels*, improperly inserted in a count against an accessary, may be rejected as surplusage.

It is not felony to receive *bank-notes*, knowing them to have been stolen.

S. C. 2 East, 748.

AT the Old Bailey in July Session 1787, *George Horne*, otherwise *Sadi*, was indicted on the statutes of 12 Anne, c. 7. and 2 Geo. II. c. 25 (*b*) for stealing two BANK-NOTES in the dwelling of *Stephen Sullivan*, Esq. the *property* of the said *Stephen Sullivan*; and *William Morris* stood charged in the same indictment on the statutes of 3 Will. and Mary, c. 9. s. 4. and 5 Anne, c. 31. s. 5. for receiving the said NOTES, the *property and chattels* of the said *Stephen Sullivan*, he the said *William Morris* well knowing the said *notes and chattels* to have been feloniously stolen. There was another count charging *William Morris* as an accessary after the fact at common law with harbouring and maintaining the principal felon.

THE prisoners were found GUILTY on all the counts (except that which charged *Morris* as an accessary at common law) on very clear and satisfactory evidence; but the Counsel for *William Morris* submitted two objections in his favour to the Court; and the Court reserved the case for the opinion of the TWELVE JUDGES.

ON the 14th November following all the JUDGES, except

(*b*) As to what shall be considered a sufficient description in an indictment of the respective species of property mentioned in this statute, see 2 East's Pleas Crown, 601.

Lord *Mansfield* and Lord Chief Baron *Eyre*, assembled at Serjeants Inn Hall, and the case was argued by 1787.

SADI AND MORRIS'S CASE.

KNOWLYS *for the prisoner* (1). FIRST OBJECTION. There is a fatal variance in the indictment between the count against the principal, and the count against the accessary. The first charges the things stolen to be the *property* of *Stephen Sullivan*, and the second charges them to be the *notes*, *property*, and *chattels* of *Stephen Sullivan*. There cannot be an accessary for receiving stolen goods, unless the goods stolen are of such a kind as are legally included within the meaning of the words "*goods and chattels* (2);" for no other kind of goods can be the subject of larceny. The word *property* is not synonymous with *goods and chattels*; for a man may have a property in many things which, in respect of the vileness of their nature, are not the subject of theft, as mastiffs, bloodhounds, cats, monkies, &c. (3). So also, if they respect the realty; as a box in which charters are contained, although the box may be of great value, and, if stolen without the charters in it, would have been the subject of an indictment of larceny. The framer of the indictment, therefore, having confined the subject of it by a certain *description*, it shall not be now permitted to define the thing stolen more strictly in the charge against the accessary than they have done in the charge against the principal: being called *property* as to the *principal*, it cannot be construed *chattels* as to the *accessary*.

(1) N.B. Mr. GARROW was also to have argued in favour of the prisoner, but the JUDGES determined to hear one Counsel only.

(2) 3 Will. & Mary, c. 9. 5 Ann. c. 31. Cro. Eliz. 490.

(3) 3 Inst. 109.

SECOND OBJECTION. The receiving of *Bank-Notes*, knowing them to have been stolen, is not felony, either by the common law, or by the statutes on which the charge against the accessary is founded. The receiving of stolen goods was at common law a misdemeanor only; and a man could not be guilty as an accessary after the fact, except by receiving the felon himself. But it is enacted by the statutes of the 3d Will. and Mary, c. 9. s. 4. and 5 Anne, c. 31. s. 5. "That whoever shall buy or receive *any goods or chattels* that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, shall be taken and deemed an accessary to such felony after the fact, and shall incur the same punishment as an accessary to the felony after the felony com-

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SADI AND MORRIS'S CASE.

mitted." The question therefore is, Whether *Bank-Notes* can be considered as *goods and chattels* within the meaning of these statutes? Bank-Notes were not, at common law, the subject of larceny; for although that offence is defined to be the felonious taking and carrying away the Goods and Chattels of another (4), yet it has always been confined to the mere personal Goods and Chattels of another, which do not extend to every species of personal property of which a man may become possessed. The words *bona et catalla* do not of their proper nature extend to charters, or to any evidences concerning the freehold or inheritance, or to obligations, or to deeds, or to other specialties (5); and therefore it is said by LORD DYER, that an action of trover will not lie for a bond, nor can the value of it be demanded by the name of Goods and Chattels (6). Among this species of property which were not the subjects of larceny, because they were not comprehended within the legal idea of Goods and Chattels (7), were Bank-Notes, and every other description of property which is within the denomination of a *Chose in Action*. But it is enacted by the statute 2 Geo. II. c. 25. s. 3. "That if any person or persons shall steal or take by robbery any Exchequer orders, Exchequer bills, *Bank-Notes*, bonds, bills of exchange, &c. notwithstanding any of the said particulars are termed in law a *Chose in Action*, he shall be deemed guilty of felony of the same nature, and in the same degree, as it would have been if the offender had stolen any other *goods* of the like value with the money due on such orders, bills, bonds, notes, &c. or secured thereby." This statute undoubtedly makes Bank-Notes so far Goods and Chattels as to make them the subject of larceny, but no farther: it does not say that the receivers of stolen Bank-Notes shall be considered as accessaries after the fact, or that Bank-Notes shall be considered as Goods and Chattels to all intents and purposes whatsoever. As to the provision, that such persons who shall steal them shall be punished "in the same manner as if they had stolen *other goods* of the like value," the word "*goods*," in this part of the Act, is not used in the strict, legal, and technical sense of the term, but is only put

(4) Calye's Case, 8 Co. 33. a. and b.

(5) Yelv. 68.

(6) Dyer, 5.

(7) Style, 91. Cro. Eliz. 888. Yelv. 4.

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as an instance, and used in the general and colloquial acceptation of the word, as synonymous to "*property*" in general. If any doubt could be entertained on this subject, the opinion of LORD MANSFIELD in the case of *Miller* v. *Race* (1), long subsequent to the passing of the Act, would certainly remove it; for his Lordship expressly declares, that Bank-Notes do not resemble, and therefore ought not to be compared to *goods*, securities, documents, and other chattels; but are to be treated as *money or cash*; and it has been uniformly held, that money cannot be included within the meaning of the words "Goods and Chattels." In *Davidson's Case*, at Carlisle Assizes 1766, a man was indicted for receiving money, knowing it to have been stolen; and MR. JUSTICE BATHURST was clearly of opinion, that *money* was not within the statutes 3 Will. and Mary, c. 9. or 5 Anne, c. 31. In the case of *Woolcomb* v. *Woolcomb* it was held by LORD CHANCELLOR KING, that the ready-money and bonds of a testator do not pass by the word "*goods*." FOSTER also says, that *money* is not within the 10 and 11 Will. 3. c. 23. which makes it a capital offence to steal any *goods*, *wares*, and *merchandises*, to the value of five shillings, from a shop or warehouse. But even admitting that *Bank-Notes* were now taken to be *Goods and Chattels* by virtue of the 2 Geo. II. c. 25. to all intents and purposes whatsoever, yet it would be impossible to include the receivers of them under the 3 Will. and Mary, c. 9. and 5 Anne, c. 31. because "*Bank-Notes*" could not be at that time in the contemplation of the Legislature as *Goods and Chattels*. All bonds, bills, notes, and other securities, were then *Choses in Action*, and could not be included, by any construction, within the meaning of the words "*Goods and Chattels*;" for those words can only refer to the receipt of such things as were Goods and Chattels at the time the Acts were passed. The statute of the 31 Eliz. c. 12. takes away clergy from accessaries after the fact in horse-stealing; but it has been held, that the statute only extends to such offenders as were accessaries at the time the Act was made, *viz.* accessaries at the common law; and therefore if a man knowingly receiving a stolen horse, did not also receive the felon, he was held not within the Act. It is true, that such

(1) Hil. 31. Geo. II. 1 BURR. 457.

3 P. Will. 115.

Foster 79.

Foster, 373.

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an offender may now be punished as a receiver of stolen goods under the 5 Anne, c. 31.

SADI AND MORRIS'S CASE.

MR. BARON PERRYN, in January Session 1788, delivered the opinion of the Judges to the following effect:—This case was reserved on two grounds. FIRST, On a variance between the count against the principal, wherein the notes are charged to be the "*property*" of *Stephen Sullivan*, and the count against the accessary, wherein they are charged to be the "*property and chattels*" of *Stephen Sullivan*. SECONDLY, That the receiving of Bank-Notes is not within any Act of Parliament which makes receivers accessaries after the fact. The JUDGES, with respect to the first objection, are unanimously of opinion, that the word "*Chattels*" in the count against the accessary, may be rejected as surplusage. The subject of the second objection has occasioned among them a difference of sentiment, but a majority of seven out of ten are of opinion, in which opinion I concur, that *Cayle's Case*, (1), *Channel* v. *Ramsbottom*, (2) and particularly *Miller* v. *Race*, (3), are in point; and that "*Bank-Notes*" are not "*Goods and Chattels*" within the meaning of the statutes of the 3 Will. & Mary, c. 9. and 5 Anne, (*a*), c. 31. and that the judg-

Absent LORD MANSFIELD and EYRE, C. B.

(1) 8 Co. 33.
(2) Yelv. 68.
(3) 1 Burr. 457.

(*a*) It appears by the report of this case, 2 East, C. L. 749. that two of the JUDGES, *viz.* GOULD and ASHHURST, were strongly of a different opinion, to which the other (LORD LOUGHBOROUGH) also inclined; considering it as a consequence of law, that where a new felony is created by statute, it draws after it all the incidents of felony at Common Law, and therefore includes accessaries before and after. They thought that the statute 2 Geo. II. c. 25. s. 3. having made it felony to steal *Bank-Notes* in like manner as if the party had stolen *Goods* of the like value, the receivers of such property stood in the like predicament as the receivers of other goods and chattels. And the reporter adds, that the opinion of the majority in the above Case seems to have been much shaken by the resolution of all the JUDGES in *Dean's Case*, *Post*, Old Bailey July Session, 1795; Campbell's Case, *Post*, Old Bailey January Session 1792; Owen's Case, *Post*, Old Bailey July Session 1792; and Watson's Case, *Post*, Old Bailey December Session 1794; in all which cases Bank-Notes, by the operation of the statute 2 Geo. II. c. 25. s. 3. were holden to be within 12 Anne, c. 7. which makes the stealing of any money, goods or chattels, wares or merchandises to the value of 40s shillings in a dwelling-house a capital offence.

ment against the prisoner *William Morris* must consequently be arrested.

The prisoner *Morris* was accordingly discharged.

1787.

THE KING *against* HENRY STERNE. CASE CCXVII.

On an indictment on 8 Eliz. c. 4. for privately stealing from the person, the hand alone that takes the property is guilty of the capital part of the offence; but this is a fact for the consideration of the Jury under all the circumstances of the case.

S. C. 2 East, 701.

AT the Old Bailey, in September Session 1787, *Henry Sterne* was tried before JAMES ADAIR, Esq. Recorder, present MR. JUSTICE GROSE and MR. BARON THOMPSON, on the 8 Eliz. c. 4 (*a*). for stealing "one badge called A GEORGE, made of gold and silver, and a certain precious stone called *an Onyx*, and divers diamonds set in and upon the said badge, value five hundred pounds, the property of the Right Honourable *Henry Somerset*, Duke of *Beaufort*." The indictment consisted of two counts: the first at common law for a robbery "in a certain court and open place near the King's highway;" and the second on the statute 8 Eliz. c. 4. for stealing it privily from his person.

THE Duke of *Beaufort*, on the 4th June 1787, had been at the Court held at the Palace of *St. James* in commemoration of his Majesty's birth-day; and on his return he came down the stairs which lead into the great court of the palace, but not finding his servants in waiting there, he walked forward into the inner square, commonly called the *Kitchen-Garden Court*, where great numbers of persons were standing as usual to observe the splendour of the company on that day. While his Grace, decorated with his riband, to which THE GEORGE was pendant, waited until his carriage drew up, he observed a carriage coming by; and while he was in a manner surrounded by several of the spectators, he felt himself particularly pressed upon by the prisoner at the bar, who was dressed in blue, and by another man, who appeared to be the prisoner's companion, dressed in black; when immediately putting his hand to his side to feel for his

(*a*) Now repealed by 48 Geo. III. c. 129.

1787. [illegible] ... [illegible] ... [illegible] ...

1787.

STERNE'S CASE.

who took it, whoever that person was, took it privately and unperceived. The statute upon which this count is framed, makes privately stealing from the person a capital offence, but it has in this respect been always construed with great strictness in favour of the party accused, and as it does not extend in express terms to persons aiding and abetting the commission of the offence, the law holds, that only he whose hand actually takes the property is guilty of the privately stealing (*a*). The case is different in indictments on the statute 10 and 11 Will. III. c. 23. for preventing shop-lifting, because by that statute, those who shall assist, hire, or command any person to commit such offence, are expressly excluded from clergy. The evidence in the present case leaves no room to doubt that THE GEORGE was privately stolen from his Grace; and the only question is, whether the prisoner is the person who actually stole it. Now the circumstance of finding stolen property in the possession of a man is presumptive evidence to shew that he was the person who stole it; and in itself, simply considered, it is evidence that he stole it in the particular mode in which it was stolen: thus, if goods are stolen out of a house by means of a burglary, the possession of those goods, unaccounted for, is evidence, very slight indeed, but still evidence, not only that he stole the goods, but that he committed the burglary. So where property has been taken by robbery, the possession of such property, recently after the fact is committed, is evidence that the possessor obtained it by that identical species of offence. So in the present case, the possession of THE GEORGE is *prima facie* evidence that the prisoner stole it in the particular manner described in the indictment. But the presumption arising from this circumstance may, in this and in all the cases mentioned, be explained and rebutted by the other circumstances of each case: and the question in this case is, under all the circumstances, whether *Henry Sterne*, the prisoner at the bar, was actually the person whose hand took this property from the possession of his Grace the Duke of

See 2 H. H. P. C. 367.

See now 48 Geo. III. c. 129. s. 2.

(*a*) See the Case of Mary and Bridget Murphy, Old Bailey April 1788, *ante*, page 266, Case 132.

1787.

STERNE'S CASE.

Beaufort; for if it were taken by the man in black, and handed over by him to the prisoner, as is usual in larcenies of this description, although the prisoner in that case is equally guilty of the *common larceny* with the person who actually took it, yet he cannot, in construction of law, be considered guilty of the *privately stealing*, because that particular species of guilt can only be fixed on the person who did the act; and the inference of law arising from the possession of the stolen property will be rebutted and destroyed.

THE Jury, under these directions from the Court, retired for some time, and returned with a verdict of *Not Guilty* on the first count; *Guilty of stealing, but not privately*, on the second.

THE prisoner was transported for seven years.

CASE CCXVIII.

THE KING *against* THOMAS DEAN.

In what manner a *misnomer* may be pleaded and tried, and a convict deprived of his clergy by means of a *counter-plea*.

THE prisoner was indicted by the name of *Thomas Dean* at the Old Bailey in September Session 1787, for *putting off* counterfeit money, contrary to the provisions of 8 and 9 Will. III. c. 26. s. 6.

ON being put to the bar to be arraigned, he pleaded by Counsel *ore tenus*, that his name was *John* and not *Thomas Dean* (*a*).

THE Clerk of the Arraigns on behalf of the Crown replied, that he was as well known by the name of *Thomas* as by the name of *John Dean*; and upon this replication the issue was joined.

THE Sheriff returned a Jury *instanter* to try this issue, and it was found for the Crown; upon which the prisoner pleaded over to the felony, *Not Guilty*.

(*a*) A misnomer of a surname may also be pleaded to an indictment, as that he was always called and known by the surname *Shakespeare* and not by the surname *Shakepear*. 10 East's Term Rep. 83.

1787.

DRAN'S CASE.

HE was immediately arraigned upon the indictment, and put upon his trial; and the Jury found him *Guilty*.

ON being asked by the Clerk of Arraigns, what he had to say why judgment of death should not be passed upon him according to law, he prayed to be allowed the benefit of clergy. Against this *plea* the Counsel for the prosecution filed a *counter-plea*, which alleged that the prisoner was not entitled to the benefit of the statute, because it had been before allowed to him.

THE COURT gave the prisoner time till the ensuing Session to frame a replication to this counterplea; but he died in Newgate in the intermediate time.

THE KING *against* ANDREW REDMAN AND OTHERS.

CASE CCXIX.

AT the Old Bailey in September Session 1787, before MR. JUSTICE GROSE, *John Cooper* was indicted for grand larceny; AND *Thomas Upton*, *Farrel Kernan*, and *Andrew Redman*, were charged in the same indictment, on the statutes of 3 Will. and Mary, c. 9. s. 4. and 5 Ann. c. 31. s. 5. as accessaries after the fact.

A bad indictment may be made good by rejecting, as insensible and useless, such words as obstruct the sense of it.

2 Roll. Abr. 247.

THE charge in the indictment against *Andrew Redman* was in these words: "And the Jurors, &c. do further present, that *Andrew Redman*, late of the parish of, &c. six cotton shirts, of the value of twenty-five shillings, being other part and parcel of the goods and chattels so aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have (he the said *Andrew Redman* then and there well knowing the said goods and chattels *to have feloniously stolen*, taken, and carried away) against the form of the statute," &c.

THE words of the statutes are, "That if any person or persons shall buy or receive any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same *to be stolen*, he or they shall be taken or deemed an accessary or accessaries to such felony after the fact," &c.

1787.

REDMAN'S CASE.

IT was objected, before MR. SERJEANT ADAIR, Recorder, in arrest of judgment, that in that part of the indictment which should have imputed to the accessary a knowledge of the felony before committed, the framers of it had used the *present tense* of the infinitive mood of the active auxiliary TO HAVE, *viz.* "to have feloniously stolen," instead of the *past time* passive of the neuter verb TO BE, *viz.* "to have been feloniously stolen."

THE RECORDER upon this objection respited the judgment, and submitted the case to the opinion of the TWELVE JUDGES.

IN October Session 1787, the prisoner was put to the bar, and informed by MR. JUSTICE HEATH, that upon mature consideration the JUDGES were of opinion, That the indictment might be supported by rejecting as *insensible* the words which obstruct the sense, *viz.* the words "to have;" and then the indictment would run thus, "the said *Andrew Redman*, then and there well knowing the said goods and chattels feloniously stolen, taken, and carried away (1)."

(1) See 4 Geo. 1. c. 11.

THE prisoner upon this determination received sentence to be transported for the term of fourteen years, to commence from the time of his conviction.

CASE CCXX.

THE KING *against* DURHAM AND CROWDER.

The practice of not calling upon a prisoner to defend himself against the single uncorroborated testimony of an accomplice, is rather a matter of *discretion with the Court* than a general *rule of law*; and a prisoner may be convicted on such testimony, if the Jury believe the witness.

OLD BAILEY December Session 1787, the prisoners were tried before MR. BARON PERRYN for burglary in the dwelling-house of *Hannah More*, and stealing therein a great quantity of wearing-apparel.

THE only evidence which affected the prisoners arose from the testimony of one *Francis Fleming*, a pawnbroker, who had been in the habit of receiving stolen goods for a series of years, but who had impeached a great number of the principal offenders, and been bound over by the Justices of the Peace to give evidence against them as a witness for the Crown.

1787.

DURHAM AND CROWDER'S CASE.

THE prisoners' Counsel, by an examination of *Fleming* on the *voir dire*, endeavoured to prove him an accomplice in the burglary, in order to form an objection against the competency of his evidence, on the ground that no previous testimony of the prisoners' guilt had been given, and that under such circumstances the uncorroborated testimony of an accomplice could not be received.

BUT THE COURT said, that *Fleming* was to be considered rather as an accessary after the fact than as an accomplice in the fact: but even admitting that he had been an accomplice, the objection would only go to his credit, and not to his competency. This matter was determined by all the JUDGES on the first day of the present Michaelmas Term. MR. JUSTICE BULLER had tried a prisoner for felony, and he was convicted on the evidence of the accomplice only: he referred the case to the TWELVE JUDGES; and the TEN JUDGES who were present were unanimously of opinion, That the circumstance of his being an accomplice went to his *credit* only, and that his evidence might be left with the Jury, although it was entirely uncorroborated by any other testimony (1); and that the practice of rejecting an unsupported accomplice, is rather a matter of discretion with the Court than a rule of law.

Atwood's Case, at the Summer Assizes at Bridgewater, 1787. *Ante*, p. 464. Case 214.

THE COURT accordingly told the Jury, that the case depended entirely on the evidence of *Fleming*; and after some deliberation, they found the prisoners GUILTY.

THE matter was afterwards mentioned to the JUDGES, and the prisoners at the end of the Session received sentence of death (*a*).

(1) There was evidence in this case that a felony had been committed.

(*a*) At Old Bailey January Session 1784, Smith and Davis were tried for robbing George Hunter. During the night the prosecutor was attacked by four ruffians, whose persons he was unable to identify; but during the scuffle he had torn a piece of the coat which one of them had on, who, on being discovered by this mean, turned King's evidence and implicated the two prisoners. But the Court, though it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony, and the prisoners were acquitted.

1787.

CASE CCXXI.

THE KING *against* WYER.

A prisoner committed for knowingly receiving part of the cargo of a ship in the *Thames*, is not entitled to be bailed; for the offence is *felony*, though it is not expressed to be so in the statute 2 Geo. III. c. 28. *Sed quære.* S. C. 2 East, 753, 754. S. C. 2 Term Rep. 77.

THE defendant was brought before the Court of King's Bench, in Michaelmas Term 1787, under a writ of *Habeas Corpus*, and prayed that he might be admitted to bail. On reading the return, it appeared that he had been committed on a charge of receiving part of the cargo belonging to a vessel in the river *Thames*, he well knowing the same to be stolen.

IT is enacted by the statute 2 Geo. III. c. 28. s. 12. for preventing *thefts* and frauds by persons navigating boats on the river *Thames*, That every person who shall buy or receive any part of the cargo or loading of, or any goods, stores, or things of or belonging to any ship or vessel in the river *Thames*, knowing the same to be stolen or unlawfully come by, or shall privately buy or receive any such goods, stores, or things, or any part of such cargo or loading by suffering any door, window, or shutter to be left open or unfastened between sun-setting and sun-rising for that purpose; or shall buy or receive the same at any time in any clandestine manner from any person or persons whomsoever, shall, being thereof convicted by due course of law (although the principal felon or felons has or have not been convicted of stealing or unlawfully procuring the same) be transported for fourteen years, according to the laws in force for the transportation of felons."

FIELDING and GARROW *for the prisoner* contended that the offence described by the statute was a *misdemeanor* only, and not a *felony*; for that as the Legislature had not expressly enacted that it should be a felony, it could not be made so by construction and implication; and that the concluding words of the clause were merely explanatory of the time and manner of punishment, and not descriptive of the kind of offence.

SHEPHERD *for the prosecution* contended that the offence for which the prisoner was committed was felony, and therefore the Court would not admit him to bail. By the 3 and 4

1787.

WYER'S CASE.

Will. and Mary, c. 9. s. 4. receivers of stolen goods may be prosecuted as felons; and by 1 Ann. st. 2. c. 9. s. 2. may be punished as for a misdemeanor, where the principal felon is not convicted. The statute, therefore, under which the prisoner stands committed, must be considered *in pari materiâ*; and although the 12th section do not in express words declare that such offenders shall be *felons*, yet it is evident they were intended by the Legislature to be so considered; for by section 14. any person stealing or unlawfully receiving stolen goods, knowing the same to be stolen, shall, on discovering two other offenders, be intitled to a pardon for all *such felonies*.

THE COURT being of opinion that the offence is FELONY (*a*) the prisoner was remanded.

(*a*) And see now the 39 and 40 Geo. III. c. 87. s. 22. which, after reciting that the offences enumerated in 2 Geo. III. c. 28. *not being thereby declared to be* FELONY, the trial thereof may in all cases be put off by means of a traverse to the next Sessions, and the offender in the mean time bailed, whereby justice has been in many cases eluded, enacts for remedy thereof, that every person indicted for any of the said offences shall plead to the said indictment without having time to traverse the same, *as is usual in cases of* MISDEMEANORS.

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CASE CCXXII.

THE KING *against* WILLIAM HOWE.

In what manner the statutes for the preservation of shrubs, roots, plants, &c. shall be expounded.

S. C. 2 East, 588.

AT the Old Bailey in January Session 1788, *William Howe* was convicted before MR. JUSTICE WILSON, present L. C. B. EYRE, on the statute 6 Geo. III. c. 36. for spoiling and destroying, in the night-time, five SHRUBS called *sweet bay-trees*, of the value of five shillings, growing in an inclosed ground belonging to *Robert Palethorp*.

A DOUBT arose, Whether the statute 6 Geo. III. c. 36. which makes the offence felony, punishable with transportation for seven years, was not virtually repealed by the statute of 6 Geo. III. c. 48. s. 3. which makes the offender liable to pecuniary penalties only, on his first and second conviction.

1788. Upon this doubt the judgment was respited, and the case referred to the consideration of the TWELVE JUDGES.

HOWE'S CASE.

THE statute of 6 Geo. III. c. 36. enacts, "That all and every person and persons who shall in the *night-time* pluck up, break, spoil, or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants, of the value of *five shillings*, and which shall be growing, standing, or being, in the garden-ground, nursery-ground, or other inclosed ground, of any person or persons whomsoever, shall be deemed and construed to be guilty of FELONY, and the Court have authority to transport such offenders for seven years."

THE statute of 6 Geo. III. c. 48. s. 3. enacts, "That all and every person who shall pluck up, or cut, spoil, or destroy, or take or carry away, any root, shrub, or plant, roots, shrubs, or plants, out of the fields, nurseries, gardens, or garden-grounds, or other cultivated lands, of any person or persons whomsoever, without the consent of the owner or owners thereof first had and obtained, and shall be thereof convicted on the oath of one or more witness or witnesses, before one or more Justice or Justices of the Peace for the county or place where the offence shall have been committed, shall for the *first offence* forfeit any sum not exceeding *forty shillings*, *&c.* together with the charges previous to and attending such conviction.—And if any persons so convicted shall again commit the like offence, and shall be thereof convicted in manner aforesaid, such person and persons shall forfeit for such *second offence* any sum not exceeding *five pounds*, *&c.* together with the costs and charges, &c.—AND if any person so before convicted shall a *third time* commit the like offence, and shall be thereof convicted, such person for such third offence shall be deemed *guilty of felony*; and the Court hath authority to transport such person for the space of seven years."

MR. BARON THOMPSON, in the February Session following, delivered the opinion of the JUDGES.—At a meeting of the JUDGES, from which only one was absent, this case was taken into consideration; and they are unanimously of opinion, That the statute of 6 Geo. III. c. 36. upon which the

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HOWE'S CASE.

indictment is founded, is not repealed by the statute of 6 Geo. III. c. 48. s. 3. The first statute applies only to the offence of stealing or destroying shrubs of the value of five shillings in the *night-time*, and does not at all extend to the stealing or destroying shrubs in the *day-time*, be their value to what amount it may. The second statute was passed during the same session of Parliament as the first statute, and it recites the practice which prevailed of stealing and destroying roots, shrubs, and plants, many of which, says the preamble, are of great value: and to protect this species of property both by *day* and by *night*, this Act was made. The order in which the chapters of the statute book is arranged is mere accident, and depends on the will of the clerks in parliament; and as these statutes were passed in the same Session (*a*) they are to be considered in *pari materiâ*, as composing one system of law, and when taken together their provisions will stand thus: If the property taken or destroyed be of the value of five shillings, and the offence be committed in the *night-time;* the offender may be prosecuted for the felony under the 6 Geo. III. c. 36. —If the property be under the value of five shillings, and taken or destroyed *by night* or *by day;* or being above the value of five shillings, and under forty shillings, is taken or destroyed in the *day-time;* the offender can only be punished by the penalties inflicted by 6 Geo. III. c. 48. s. 3.—The JUDGES therefore are all of opinion, That the prisoner was properly convicted upon the first-mentioned statute.

The prisoner was fined one shilling and imprisoned six months (*b*).

(*a*) But MR. JUSTICE BULLER was of opinion, that if these two statutes had been made in different Sessions the last would have been a virtual repeal of the former. 2 East, C. L. 589.

(*b*) See S. C. 2 East, 589. that it was the opinion of the Judges that the Court were not obliged to transport the offender under 6 Geo. III. c. 36. but might pass any other sentence that may be passed for a single felony.

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CASE CCXXIII.

THE KING *against* HENRY JUDD.

In a commitment for felony it is not necessary to allege that the offence was *feloniously* done; it is sufficient if enough appear for the Court to collect whether the charge be felony or not; and they will accordingly *bail* or *remand* the prisoner.

Setting fire to *a parcel* of unthreshed wheat, is not felony within 9 Geo. I. c. 22. S. C. 2 East, 1018.

HENRY JUDD was committed to *Hertford* gaol, by a warrant under the hands and seals of eleven Justices of that county, on the oath of *George Sworder* and others, charging him "with giving two guineas to one *Daniel Wright* (which *D. Wright* stands convicted of a burglary in the dwelling-house of the said *George Sworder*) to disturb the dwelling-house of the said *George Sworder*. AND ALSO—with giving to *Nathaniel Rand*, about a fortnight after harvest last, a guinea and a half, to *keep on* with the said *George Sworder* as the said *N. Rand* had then begun, and to do him the said *George Sworder* all the mischief he could, except killing him. —AND for being accessary with the said *N. Rand*, who was committed to Hertford gaol on the oaths of the said *George Sworder* and others, as well as upon his own confession, in wilfully and maliciously setting fire to a parcel of unthreshed wheat, in the night, the property of the said *George Sworder*; and which he the said *N. Rand* hath confessed he did at the request of the said *Henry Judd*."

ON Monday the 4th February 1788, the prisoner was brought up to the Court of King's Bench from Hertford gaol by *Habeas Corpus* to be bailed; and his commitment being read, it was contended

BY SILVESTER and FIELDING *for the prisoner*, that the warrant contained no charge of felony, and therefore he was intitled to be bailed or discharged by virtue of the statute 31 Car. II. c. 2.

ERSKINE, MINGAY, and GARROW, *for the Crown*, admitted that the first two charges in the warrant did not contain such a description of felony as would entitle them to expect that the prisoner should be remanded; but that the third charge contained a full and sufficient description of an accessary *at common law* to the felony created by the statute 9 Geo. I. c. 22. which enacts, "That if any person or persons shall set fire to any house, barn, or outhouse, or to any hovel, cock

mow, or stack of corn, straw, hay, or wood; or shall by gift or promise of money, or other reward, procure any of his Majesty's subjects to join him or them in any such unlawful act, every person so offending shall be guilty of felony without benefit of clergy."

THE prisoner's Counsel replied, that accessaries at the common law, unless there was a strong presumption of their guilt, arising from an indictment having been found against them, were entitled to be bailed; that the warrant only charged the principal "with wilfully and maliciously setting fire to a parcel of unthreshed wheat," and no such offence was made felony by the statute; and admitting it was an offence within the meaning of the statute, yet the warrant would be defective, in not charging it to have been done *feloniously*.

MR. JUSTICE ASHHURST.—However improper the defendant's conduct appears to have been upon the proceedings before the Justices, yet unless it appears upon the face of the commitment itself that the defendant is charged with a felony, we are bound by the *Habeas Corpus Act* to discharge him; taking such bail for his appearance to take his trial as we in our discretion shall think fit, according to the circumstances of the case: the question therefore is, Whether there is specified in this commitment such an offence as amounts to felony? It is admitted, that neither of the first two charges amount to felony. The last charge is, that the defendant was an accessary with *Rand* in *wilfully* and *maliciously* setting fire to a parcel of unthreshed wheat, without alleging that the offence was done *feloniously*: and although it is not necessary that the word "*feloniously*" should be used in the commitment, yet it ought to appear on the facts stated to be in law a felony, and within the description of the Act. Now the statute has only made it felony to set fire to a *cock*, *mow*, or *stack of corn*, and the defendant is not charged with either of these. We must suppose that the Legislature well knew the meaning of the words they have used; and if a Justice of the Peace use the same words, we are bound to suppose that he intended them in the same sense; but if he make use

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of other words, he must be more precise. Now, here, a *parcel* of unthreshed wheat is too loose a description (1). It does not come within the description of the Act. We cannot say how much is meant by the word *parcel*. Twenty ears of wheat may be called a *parcel*, but can never be construed either a *cock*, *mow*, or *stack*. I am therefore of opinion, that as the warrant of commitment does not charge the defendant with a felony, we are bound to bail him. With regard to the *quantum* of the bail; although the nature of the defendant's crime is not very accurately stated, yet as sufficient appears on the depositions returned with the commitment to shew that he has at least been guilty of an enormous offence, I think we ought to take ample security for his appearance, and that he himself should be bound in 1000*l.* and four sureties in 500*l.* each.

(1) An information for engrossing corn, the quantity of which is expressed by the word "*cumulus*," only, is not good. 1 Hawk. P. C. 485.

MR. JUSTICE GROSE.—It is not necessary that the act should be charged in the warrant of commitment to be done *felonicè*; it would be sufficient, if on the facts stated we could not but see that the act was feloniously committed (2). If therefore a *parcel* of wheat *ex vi termini* described a *cock*, *mow*, or *stack* of corn, I should be of opinion that a felony was sufficiently charged in this commitment, but I think that it does not; for if in the act of removing a stack of corn from a farmer's yard to his barn, a small parcel dropped by accident, the setting fire to that parcel would not be an offence within the Act of Parliament. As to the sureties which we in our discretion should require, I am of opinion, that the security mentioned by my brother ASHHURST ought to be given, since we cannot but see that the defendant has been guilty of a most atrocious act.

(2) See Rex v. Hawkins, Easter Term, 2 Geo. I. Fortes. 272.

THE defendant was bailed accordingly.

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THE KING *against* MASON.

CASE CCXXIV.

AT the Quarter Sessions at *Worcester*, *Thomas Mason* was convicted on the statute 30 Geo. II. c. 24 (*a*). and received sentence of transportation for seven years. The indictment consisted of two counts. The FIRST charged that *Thomas Mason*, on the 13th June 1777, "unlawfully, knowingly, and designedly did obtain from one *Robert Schofield* divers sums of money; that is to say, the sum of two guineas, of the value of two pounds two shillings, of the lawful money of *Great Britain*, of the proper monies of the said *Robert Schofield*, by *false pretences*, with an intent then and there to cheat and defraud the said *Robert Schofield* of the same." The SECOND charged, that the said *Thomas Mason* on the 21st July 1777 "unlawfully, knowingly, and designedly did obtain from the said *Robert Schofield* the sum of four pounds fourteen shillings and six-pence of lawful money of *Great Britain*, of the proper monies of the said *Robert Schofield*, with intent then and there to defraud the said *Robert Schofield* of the same, to the great damage, &c." and so concluding, against the form of the statute in such case made and provided."

An indictment for a fraud in obtaining money under *false pretences*, must state what the false pretences were by which the fraud was effected.
S. C. 2 East, 837.
S. C. 2 Term Rep. 581.

THIS indictment was removed by Writ of Error into the Court of King's Bench; and in Trinity Term 1788 two errors were assigned. FIRST, That it does not appear in the first count what the particular and specific *false pretences* were by which *Thomas Mason* obtained the money of *Robert Schofield*. SECONDLY, That the second count does not state by what particular means or pretences, or on what particular account the said *Thomas Mason* obtained the 4*l*. 14*s*. 6*d*. with intent to defraud *Robert Schofield*.

MARRYATT, *for the defendant*. To the first count these three objections may be made. FIRST, The offence imputed to the defendant is not specified with sufficient particularity. SECONDLY, The charge is repugnant. THIRDLY, It does

1st day of June, 1788.

(*a*) See 52 Geo. III. c. 64. by which the statute of 30 Geo. II. c. 24. is extended to other articles than money, goods, wares and merchandises.

1788. not conclude either against *the peace*, or against the *form of the statute*.

MASON'S CASE.

FIRST, The offence is not specified with sufficient particularity. Without having recourse to Lord *Coke's* definition of the kind of *certainty* which is required in law proceedings, it is sufficient to refer to the rule which Lord Chief Justice DE GREY laid down in Mr. *Horne's Case* (1), "That the charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer, that the Jury may appear to be warranted in their conclusion of *Guilty* or *Not guilty* upon the premises delivered to them; and that the Court may see such a definite crime that they may apply the punishment which the law prescribes." "This," continues his Lordship, "I take to be what is meant by the different degrees of certainty mentioned in the books (2); and it consists of two parts, the matter to be charged, and the manner of charging it. As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed, must be set out, and all beyond are surplusage." Now the first count of the present indictment does not specify the sort of pretence by which the money is supposed to have been obtained: the pretence is of the very essence of the crime, and constitutes the offence. The defendant therefore should have had notice of this, in order to prepare for his defence; and if the pretence had been stated, he might have been able to have proved, that he never made such a misrepresentation as was imputed to him: besides, it is the usual form of the precedents of indictments to state the pretence. In civil actions a declaration stating that the defendant, by divers false pretences and misrepresentations, had occasioned an injury to the plaintiff, or had deprived him of a sum of money, would be adjudged insufficient. So would a declaration in *assumpsit*, stating that the defendant was indebted to the plaintiff for divers sums of money for divers valuable considerations; then if these objections would vitiate a declaration *à fortiori*, they will apply to an indictment, where greater certainty is required. In such an indictment as the present certainty is peculiarly necessary, because it has been deter-

(1) Cowp. 682.

(2) Co. Lit. 30. 5 Co. 121. 5 Mod. 96.

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mined that there are various kinds of pretences which are not within the meaning of the statute; and it cannot be contended that all these determinations were previous to the passing of the Act; for in *The King* v. *Wheatley*, 1 Geo. III. (1) where the *defendant* had been convicted of selling malt liquor by short measure, the judgment was arrested on an objection similar to the present (*a*). In *The King* v. *Munoz* (2), where the defendant had been convicted for procuring a promissory note by *false tokens*, under the statute 33 Hen. VIII. c. 1. the judgment was arrested because the indictment did not specify the *false tokens*; and here *false pretences* is equally uncertain. In *Sparling's Case* (3), and *Popplewell's Case* (4), convictions on the statute of 6 & 7 Will. III. c. 11. were quashed, because the oaths and curses were not set forth. An indictment also has been quashed, as being too general, charging that the defendant *male et negligenter se gessit* in execution of the office of Constable (5). So in RESCUE it is necessary to state for what offence the party was in custody. It is no answer in this case to say, that the indictment pursues the words of the statute; for that answer was attempted to be given in the case of *Davy* v. *Baker* (6), and over-ruled: THAT was in an action on the statute 2 Geo. II. c. 24. for preventing bribery at elections; and the judgment was arrested, because the declaration only stated that the defendant did receive a gift or reward, without specifying *what* he received as a reward.

(1) 2 Burr. 1127.

(2) 2 Stra. 1127.

(3) 1 Stra. 497.

(4) Stra. 686.

(5) 1 Stra. 2.

(6) 4 Burr. 2471.

SECONDLY, The charge is repugnant. It states that the defendant obtained *divers sums* of money, TO WIT, *the sum* of

(*a*) The objection in Rex *v.* Wheatley, was that the facts charged did not amount to *an indictable offence*. It was an indictment at Common Law charging the defendant with having sold to one R. Webb an eighteen gallon cask of amber, he well knowing that it contained only sixteen gallons: and LORD MANSFIELD and the Court held it to be only a private injury, arising from the prosecutor's own negligence in not measuring the liquor when he received it; that the injury to be indictable, must be such as affects the public; as if a man sell by false weights, or false measures, or uses false tokens, and as no such weights, measures or tokens had been used in the present case, it amounted only to a non-performance of a contract, for which an action might be brought, and he compared it to the case of selling an unsound horse for a sound one.

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two guineas. The sum alone is repugnant to divers sums; and if it be rejected as surplusage, it is equally fatal, because then it does not specify what sums he did obtain. And if this count were to be adjudged sufficient, without particularizing either the sums which the defendant obtained, or the pretences by which he obtained them, it would be equally sufficient to state that he had obtained *divers goods*, without specifying what those goods were.

THIRDLY, This count does not conclude either *against the peace*, or *against the form of the statute*. The former of these is a sufficient objection to this count, for every indictment ought to aver the offence to have been committed against the peace. It is equally necessary that every indictment on a statute should conclude *contra formam statuti*. The judgment upon the present record is, TRANSPORTATION, which is a punishment not known to the common law; and therefore, if warranted at all, must be so by statute. But it is said in 2 *Hawk. P. C.* c. 25. s. 116. "that a judgment by statute shall never be given on an indictment at common law, as every indictment which does not conclude *contra formam statuti* shall be taken to be; and therefore, if an indictment do not so conclude, and the offence indicted be only prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it." It must be observed, that this is not an application to quash an indictment, which depends on the discretion of the Court; but this indictment comes before the Court by *Writ of Error*; and if the Court see that the indictment is defective, they are bound to reverse the judgment (1).

(1) 2 Burr. 1127.

AS to the SECOND COUNT it was objected, that it was manifestly defective, inasmuch as it did not contain a charge of any crime either against the common law or statute law.

CALDECOTT, *for the Crown*,—in answer to the objection, that the charge in the first count is too general and uncertain, because it does not give the defendant sufficient notice to prepare his defence, contended, that the use of this general form of indictment is, in many instances, established law; as in those of a common scold, where it is not necessary to specify

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MASON'S CASE.

any instance: so in charging the offence of keeping a bawdy-house, it is said in *Hawkins* (1), that it is needless to set forth any circumstances: the like for keeping a gaming-house, or for conspiracies: so in all cases of barratry; for *Hawkins* says (2), "it is enough to charge that the offender is *a common barrator*, without shewing any of the *particular facts*; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the common peace, all of which it would be too prolix to enumerate in the indictment." If then in a crime so defined, it is only necessary to state in the indictment that the defendant is a barrator, where the modes in which a person may illegally move and promote suits are certainly infinite, it is equally unnecessary in the present instance to state more than that the defendant obtained the money by *false pretences*; for upon the principle of notice, it is in itself much more likely that a defendant should know the particular acts of fraud and deceit which he has practised against the prosecutor, which is the present case, than where the prosecutor is at liberty to range through the transactions of defendant's whole life, which is the case in a charge of barratry. It is admitted that all the cases cited were before the 30 Geo. II. c. 24. except that of *Rex* v. *Wheatley* (3); and that case was determined on the ground that it was not an indictable offence. Besides, this general form of indictment on this statute has obtained so long in practice, that it ought to be considered as established law. And it has been held by this Court in many cases, and particularly in those on the game laws, that printed forms, such as those in *Burn*, shew the general sense and understanding of the profession. This form of indictment is continued in the latest edition of *The Crown Circuit Companion*, which, though not a book of authority, affords historical evidence of the use of this form at the Old Bailey; and in point of fact it is well known that many persons have been transported for this offence under this form of indictment. At all events, there is no ground for the objection in this indictment; for it states the sums of money of which the prosecutor was defrauded, and the times when the fraud was committed. To this it is objected, that

(1) 2 Hawk. P. C. c. 25. s. 57.

(2) 2 Hawk. P. C. c. 25. s. 59.

(3) 2 Burr. 1125.

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MASON'S CASE.

the charge is repugnant; because it is stated that the defendant obtained *divers sums* of money, that is to say, *the sum* of two guineas. But it is sufficient if one charge be stated under the *videlicet*. With respect to the second count, it is good, as charging the defendant with an offence at common law, namely, for cheating.

MARRYATT, in reply, was stopped by the Court.

BULLER, *Justice*.—Several objections have been made on the part of the defendant; but the material one, on which I found my judgment, is, that the indictment does not state what the false pretences were. The question is not a new one; for I remember a case when I was at the bar, though the name of it does not occur to me now, and I argued it on the analogy to the case in *Strange* for obtaining a note by false tokens, which entirely governs this. That was a case on the statute 33 Hen. VIII. c. 1. which makes it an offence to obtain money or goods by false tokens. The statute 30 Geo. II. c. 24. only enlarges the description of the offence in the statute of 33 Hen. VIII. c. 1. Both statutes are made in *pari materiâ*; and whatever has been determined in the construction of one of them, is a sound rule of construction for the other (*a*). The judgment was arrested in the case of *Rex* v. *Munoz*, because the indictment did not specify the *false tokens*: then by the same reason an indictment on the 30 Geo. II. c. 24. which speaks of *false pretences*, must state what the false pretences are, otherwise the indictment is bad: there is no distinction between the two cases; the same objection which held in the one must also prevail in the other. With respect to the form of the indictment, I am clear that the precedents have not been universally in the same form as the prosecutor's Counsel has stated, for it was otherwise in the first indictment on this statute which I ever tried; the indictment did state what the false pretences were. The other objections seem to have great weight in them; but it is not necessary to consider them in this case, because I am of opinion that the first objection is fatal, and that the judgment must be reversed.

2 Strange, 1127.

(*a*) See also 52 Geo. III. c. 64.

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MASON'S CASE.

GROSE, *Justice*.—I am of opinion, with my brother BULLER, that the objection that the pretences are not specified, is decisive, and for the reasons mentioned by the defendant's Counsel—that the defendant may know what he is to defend, and the Court may see what punishment they are to inflict. These reasons apply to all offences. The cases mentioned at the bar, of a scold, of barratry, and keeping a gaming-house, differ materially from this: they consist of several facts; this of a single one. This is a charge for a precise crime, and therefore it must be alleged. With respect to any practice to the contrary, founded on any faulty precedent, if such a practice has prevailed, it is time that it should be rectified. But such practice cannot always have obtained; for I recollect having tried several defendants on indictments which stated what the false pretences were. Therefore, without going further into the case, I am clearly of opinion that the indictment cannot be supported.

THE COURT reversed the judgment, and ordered that the defendant should be set at liberty (*a*).

(*a*) See Rex *v.* Airey, 2 East's Term Rep. 30. that if the pretences by which the fraud was effected be stated, and negatived to be true, it is sufficient though it be not in terms alleged that he *falsely* pretended, &c.

THE KING *against* DAVIS.

CASE CCXXV.

THIS was a case on THE BLACK ACT, reserved by MR. BARON PERRYN, at *Hereford* Summer Assizes 1788, for the opinion of the TWELVE JUDGES.

An indictment on the Black Act for shooting at any person, must charge that the offence was done "*wilfully* "AND *maliciously*," as well as *feloniously*. S. C. 1 East, 414.

THE words of the statute are, "That if any person or persons shall *wilfully* and *maliciously* shoot at any person in any dwelling-house, or other place, every person so offending shall be deemed guilty of felony, and suffer death without the benefit of clergy."

THE INDICTMENT stated, "that *James Davis*, being an ill-designing and disorderly person, of a wicked and malicious disposition, &c. &c. with a certain pistol, loaded with gun-

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DAVIS'S CASE.

powder and a leaden bullet, which he the said *James Davis* in his right hand had and held, he the said *James Davis* did *unlawfully*, *maliciously*, and *feloniously* shoot at one ———, &c. &c."

THE QUESTION was, whether the indictment could by any possible construction or implication, be supported? the drawers of it having neglected to pursue the very words of the statute, by leaving out the word "*wilfully*," and inserting only that the offence was committed "unlawfully, *maliciously*, and feloniously."

See 1 Black. Rep. 843. See also Cox's case, *ante*, page 71. Case 38. where the word "*wilfully*" was held necessary on the statute 5 Eliz. c. 9. See also Pegge's Case, 1 East, 420.

THE JUDGES assembled at LORD KENYON'S house on 22d February 1789, to consider this question, and the point was very much debated.—Some of the JUDGES thought that the word *wilful* was implied in the word *malicious*; but a great majority were clearly of opinion, that as the Legislature had, by the special penning of the Act, used both the words "*wilfully*" and "*maliciously*," they must be understood as a description of the offence; and that the omission, in the present indictment, was fatal to its validity.

THE prisoner, at the ensuing Assizes, was ordered to be discharged (*a*).

(*a*) Two persons were indicted for perjury on the statute 5 Eliz. c. 9. s. 6. which enacts, "That if any person shall *wilfully* and *corruptly* commit any manner of *wilful* perjury by his deposition in any of the Courts mentioned in the Act, he shall forfeit twenty pounds, and be imprisoned six months;" an exception was taken to the indictment in that it was *falsè et corruptivè deposuere*, but not *voluntariè*; and that although, at the end of the indictment it is "*et sic voluntarium commisere perjurium*;" yet this did not help it: and for this cause they were discharged, Rex *v.* Lembro and Hamper, Cro. Eliz. 147. S. C. 2 Leon. 211; and the same point is again adjudged in an anonymous Case, Cro. Eliz. 201. in the case of Rex *v.* Taylor, 1 Show 190; and in Rex *v.* Cox, *ante* p. 71. Case 38. So also in an information on the statute 37 Hen. VIII. c. 9. which enacts, "That no person by way or mean of any corrupt bargain; loan, exchange, chevisance, shift, interest of wares, merchandizes, or other thing or things whatsoever, or by any other corrupt or deceitful way or mean, &c. shall have, receive, accept, or take in lucre or gain, &c. more than ten per cent. &c." where the information charged that the defendant had taken twenty marks for the forbearing of 100*l.* for a year, *against*

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THE KING *against* EDWARD WILLAN.

CASE CCXXVI.

Larceny committed on the person of a waggoner while sleeping in the stables where his horses stand, is within the statute of 8 Eliz. c. 4. S. C. 2 East, 705.

AT the Old Bailey in June Session 1788, *Edward Willan* was indicted before Mr. SERJEANT ADAIR, Recorder, for stealing one canvas bag, two guineas, ten half-guineas, one crown-piece, five half-crowns, eight shillings, and a sixpence, the property of *Stephen Bolton*, privily from his person.

THE prosecutor, a waggoner, was sleeping on a truss of straw in the stables of an inn-yard, while his horses were feeding. The prisoner, who was horse-keeper to the prosecutor's master, was, when the prosecutor first laid down to sleep, also in the stables. The prosecutor on waking discovered that his money had been taken from him while he was asleep; and the prisoner, on being apprehended the same evening, made a voluntary confession of the fact.

the form of the statute, but did not allege that it was by means of any *corrupt bargain, means or contract* according to *the letter* of the statute, and the Court on a writ of error reversed the judgment; for that the words ought to have been expressly alleged, and not by implication, Emmot *v.* Fulwood, 1 And. 49; Hinton *v.* Roffey, 3 Mod. 85; for, says *Sir Edward Coke*, "Penal statutes are to be pursued, especially in informations, strictly and *in terminis*, according to the purview of the Act." Dr. Foster's Case, 11 Co 58. So where A. was indicted on the statute of *Præmunire*, and the words of the statute "upon the purpose and to the intent set forth and to extol the authority, &c." were omitted; the major part of the Justices who were assembled to consider of this case, thought that the indictment was insufficient, notwithstanding it concluded, "*against the form of the statutes.*" Anonymous. Dyer, 363 a; for *contra formam statutorum* will not aid where the material part of the Act which creates the offence is omitted, for it ought to be punctually pursued. Rook's Case, Hardw. 21; "for although," says *Sir Matthew Hale*, "an indictment need not recite a general penal statute, it must bring the fact within the *express* prohibition of it." 2 Hale, P. C. 192. See also 2 Hawk. P. C. ch. 25. s. 110. and Rex *v.* Pemberton. 2 Burr. Rep. 1035. Colbourne *v.* Stockdale, 1 Stra. 496. Rex *v.* Remnant, 5 Term. Rep. 170. *post*, and the case of Rex *v.* Jukes, Easter Term, 40 Geo. III. in the King's Bench, 8. T. R. 536.

1788.

WILLAN'S CASE.

It was objected by the prisoner's Counsel, that this case was not within the statute of 8 Eliz. c. 4. on which the capital part of the indictment was founded; for that it had been determined in the *Vauxhall Case* (1) that the Act did not extend to protect the property of persons asleep (*a*).

(1) See Gribble's Case, *ante*, page 240. Case 120.

But the Court said, that whatever notions might have formerly prevailed upon this subject, the contrary had lately been determined by all the Judges of England, in the case *Rex* v. *Thompson*, (2) from the Assizes at *Newcastle*, and that this determination had since been confirmed by another case of the like kind before the Recorder of *Bristol*.

(2) Page 443. Case 205.

(*a*) The 5 Eliz. c. 4. is now repealed by 48 Geo. III. c. 129.

CASE CCXXVII.

THE KING *against* JOHN SENIOR.

A casement is not within the statutes of 4 Geo. II. c. 32. or 21 Geo. III. c. 68.

S. C. 2 East, 593.

At the Old Bailey in September Sessions 1788, *John Senior* was indicted before Mr. Serjeant Adair, Recorder, present Mr. Justice Gould, Mr. Justice Grose, and Mr. Baron Hotham, on the statutes 4 Geo. II. c. 32. and 21 Geo. III. c. 68. for feloniously stealing one *window casement, made of iron, lead, and glass*, the property of the Benchers of the Middle Temple, fixed to a certain building situate in Elm Court, he having no title, or claim of title to the same.

The Court.—The statutes upon which this indictment is founded, among the several articles which they enumerate, do not mention, "*a casement.*" The 4 Geo. II. c. 32. says, that "whoever shall steal, rip, cut, or break, with intent to steal, any *lead, iron bar, iron grate, iron palisadoes, or iron rail* (*a*) whatsoever, being fixed (*b*) to any

(*a*) Stealing iron rails fixed to a tomb in a church-yard, not connected by any building with the church, is not within the statute. Rex v. John Davis, Old Bailey, January Session, 1792.

(*b*) See Hedges's Case, Old Bailey, May Session, 1779, *ante*, page 201. Case 100.

1788.

SENIOR'S CASE.

dwelling-house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house or other building, shall be transported for seven years." The 21 Geo. III. c. 68. which is an Act to explain and amend the 4 Geo. II. c. 32. recites that the stealing of copper, brass, and bell-metal affixed to dwelling-houses, &c. is not thereby expressly prohibited; gives the Court a discretionary power either to transport for seven years, or to imprison for a less time, such persons who shall "steal, rip, cut, break, or remove, with intent to steal, any *copper, brass, bell-metal utensil or fixture*, being fixed to any dwelling-house, out-house, coach-house, &c." The latter Act being made to remedy the defects of the 4 Geo. II. c. 32. the words, "any *copper, brass, bell-metal utensil or fixture*," are to be taken as substantive nouns; and not as descriptions of the sorts of fixtures which the Legislature intended to protect. The former Act mentions every specific article by name; and as the article for the stealing of which the present indictment was preferred, is not mentioned, the prisoner must *go without day.*

NOTE, the prisoner was indicted for a similar offence in the December Session following, before MR. JUSTICE WILSON, in stealing *a casement* from a stair-case in *Barnard's Inn*, and acquitted upon the authority of this determination.

THE KING *against* LYNN.

CASE CCLXXVIII.

Taking up dead bodies, though for the purposes of dissection, is an indictable offence.

LYNN had been convicted of *a misdemeanor* on an indictment which charged, that he, on such a day, had entered a certain burying-ground, and taken from a coffin buried in the earth *a dead body*, for the purposes of *dissection.*

IN Michaelmas Term 1789, it was moved in the Court of King's Bench in arrest of the judgment, that this was an offence of *ecclesiastical cognizance*, and not indictable in any

[redacted]

[redacted] but by [redacted] court, [redacted] [redacted] was not [redacted]

[redacted] [redacted] being com- [redacted] [redacted] was only fined [redacted]

[redacted]

[redacted] [redacted] Mr. [redacted] [redacted] Walker, one [redacted] a Mem- [redacted] [redacted] by the [redacted] [redacted] [redacted] to take [redacted] [redacted] [redacted] religion, by [redacted]

[redacted] [redacted] being ad- [redacted] [redacted] [redacted]

1788.

COCKWAINE'S CASE.

convert to his own use the goods mentioned in the indictment; and told the said Mr. *Rankin*, that a Mr. *Sansom* who lived in a neighbouring street, was going out of town early the next morning, and wanted a new round hat, and desired that he, the said Mr. *Rankin*, would take some hats of that kind to shew to Mr. *Sansom*; that Mr. *Rankin* went accordingly to Mr. *Sansom*'s in London-street; and while he was gone, the prisoner returned in about three minutes to the shop of Mr. *Rankin*, and said to a servant-man of Mr. *Rankin*'s, who was in the shop when the prisoner first went there, '*Your master is at our house, and he has sent me, and says you must give me the cocked hat and round hat that are in the window:*' that the servant-man accordingly, then and there, delivered to the prisoner the said two hats: that the prisoner went away with the said two hats, and *unlawfully* converted them to his own use; and that the said Mr. *Rankin* did not in truth and in fact send him or any other person for the said hats (*a*). But whether, under these circumstances, the said *Isaac Cockwaine* be guilty of felony the Jurors pray the direction of the Court. And if, &c."

THIS was at first intended as *a special verdict*, but was afterwards drawn up as *a special case*, and referred to the TWELVE JUDGES; and it came more than once under their consideration; but no opinion was ever given.

(*a*) The Judges, in considering the case of Rex *v.* Pares, adverted to the question whether his case was at all affected by the statute 30 Geo. II. c. 24. and they were of opinion that that statute applied to all cases where goods were obtained by a *false pretence* of any kind, but that both the statutes of 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. are confined to cases where credit was obtained in *the name of a third person*, and do not extend to a case where a man *on his own account* gets goods with an intention to steal them; that where an original intention to steal appears, the statutes do not apply; where no such intent appears, if the means mentioned in the statutes are made use of, the Legislature had made the offender answerable criminally, who before, by the common law of the land, was only answerable civilly. See 2 East, P. C. 689. and the observations of MR. BARON EYRE, *ibid. in notis*.

1788. THE prisoner remained in Newgate in February Session 1790, after which he received A PARDON, and before the April Session following he was discharged.

COCKWAINE'S CASE.

1789.

CASE CCXXXI. THE KING *against* WILLIAM WOODCOCK.

In murder, the declarations of the deceased after the mortal wound is given, may be received in evidence, though the party did not *express* any apprehension of approaching dissolution: but the examination of such a person taken by a magistrate *extrajudicially* cannot be received.

S. C. 1 East, 354, 356.

AT the Old Bailey January Session 1789, *William Woodcock* was tried before LORD CHIEF BARON EYRE, present MR. JUSTICE ASHHURST, and MR. SERJEANT ADAIR, Recorder, for the wilful murder of *Silvia Woodcock*, his wife.

IT appeared in evidence, that she was found lying in a ditch, in a narrow lane, called *Robinson's Lane*, in the vicinity of *Chelsea*, in the county of *Middlesex*. She had received eight wounds about the head, face, and neck, which seemed to have been inflicted with the end of a blunt instrument; and was so exhausted by the loss of blood as to be apparently dead. The body was taken to *Chelsea Poor-house*, put into a warm bed, and by medical assistance restored to life. In the course of eight hours, she recovered her senses to such a degree, as to be enabled to give a rational account of the circumstances by which this catastrophe was accompanied. The overseers of the parish, therefore, thought it expedient to desire the attendance of a magistrate, for the purpose of taking her information in legal form. Mr. *Read*, a Justice of the Peace for the county, attended at *the Poor-house* accordingly. He found the informant, who was a baptized mulatto, and native of the East Indies, in a state of perfect recollection. He told her that he was a magistrate come to take her examination, and admonished her to speak the truth; and as she appeared sensible of the impiety and dangers of falsehood, he administered an oath to her, and received her information, which he reduced, in her own words, into writing. He afterwards read it over to her with great deliberation, and gave it to her to sign, and she made her mark on the paper in approbation of its contents. The magistrate then signed it himself; and being proved on the

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WOODCOCK'S CASE.

trial, it was read in evidence. It also appeared, from the evidence of the surgeons, that she died in about eight-and-forty hours after the examination had been taken, and that it was impossible from the first moment that she could live long; but that although she retained her senses to the last moment, and repeated the circumstances of the ill usage she had received, she never expressed any apprehension, or seemed sensible of her approaching dissolution. The evidence, independent of the *information* or *declarations* of the deceased, was of a very pressing and urgent nature against the prisoner.

UNDER these circumstances a question arose with THE COURT, Whether the evidence which had been obtained from the deceased could legally be left with the Jury? The learned Judge therefore stated the case to them, independent of that evidence; and then stated his opinion of the admissibility of the examination to the following effect:

EYRE, *Chief Baron.*—If I were satisfied that the case was quite full without the circumstances which the deceased has disclosed, I should willingly omit to state them as evidence against the prisoner, because there is some difficulty as to the legality of their admission. Great as a crime of this nature must always appear to be, yet the inquiry into it must proceed upon the rules of evidence. The most common and ordinary species of legal evidence consists in the depositions of witnesses taken *on oath* before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two other species which are admitted by law: The one is *the dying declaration* of a person who has received a fatal blow (*a*); the other is *the examination* of a prisoner, and *the depositions* of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of a particular Act of Parliament, which authorizes Magis- 1 Hale, 585.

(*a*) Rex *v.* Ely, at Old Bailey, 1720, before L. C. J. King. 12 Viner's Abr. 118.

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trates to take such examinations, and directs that they shall be returned to the Court of Gaol Delivery. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *vivâ voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact. In the present case a doubt has arisen with the Court, to which doubt I entirely subscribe, Whether the examination of the deceased, taken in writing at the poor-house by Mr. *Read*, the Magistrate, is an examination of the *nature* I have last described? It was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of contradicting the facts it contains. It was not in the discharge of that part of Mr. *Read*'s duty by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a voluntary and extrajudicial act, performed at the request of the Overseer; and although it was a very proper and prudent act, yet being voluntary, and under circumstances where the Justice was not authorized to administer an oath, it cannot be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken. But although we must strip this examination of the sanction to which it would have been entitled, if it had been taken pursuant to the directions of the Legislature, yet still it is the declaration of the deceased, signed by herself, and it may be classed with all those other confirmatory declarations which she made after she had received the mortal wounds, and before she died. Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. But a difficulty also arises

2 Strange, 925.

See the Case of Rex v. Reason and Tranter for the murder of Mr. Lutterell, 1 Strange, 499. 6 State Trials, 195, 202; and Bambridge's Case, 9 vol. of Harg. State Trials, 161.

See Johnson's Shakspeare, KING JOHN, Act the 5th, Scene the 6th, line 27, and Loffit's Edition of Gilb. Evidence, 1 vol. p. 280.

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with respect to these declarations; for it has not appeared, and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state (*a*) of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. The several witnesses could give no satisfactory information as to the sentiments of her mind upon this subject. The surgeon said, that she did not seem to be at all sensible of the danger of her situation, dreadful as it appeared to all around her; but lay, submitting quietly to her fate, without explaining whether she thought herself likely to live or die. Upon the whole of this difficulty, however, my judgment is, that inasmuch as she was mortally wounded, and was in a condition which rendered almost immediate death inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; her declarations, made under these circumstances, ought to be considered *by*

(*a*) In the case of Henry Welbourn, who was indicted at Lincoln Summer Assize 1792, for poisoning Elizabeth Page, his fellow-servant, she declared that she was with child by him, and by his persuasion and procurement had been taking bitter apple, and a white powder, which was found to be arsenic, for the purpose of producing abortion. She had recently been in great pain, and was extremely ill, apparently dying, and seemed to be sensible of her situation and danger, though she did not say so, but at the time she made the declaration she was free from pain, a mortification, in the opinion of the apothecary, having taken place, and from being so free from pain he believed that she thought she was getting well. She died, however, in an hour afterwards. The declaration was received, and the prisoner was found guilty; but the case was referred to the Judges on the question, that although in the first part of the apothecary's evidence he swore that he made the deceased sensible of her danger before she made the declaration, yet as he afterwards said, that at the time she made the declaration *she believed that she was getting better from the pain ceasing*, the evidence ought not to have been rejected: and a majority of the Judges were of opinion that it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration; on the contrary, she had reason to think that if she told what was the matter with her she might have relief and recover. 1 East, C. L. 359, 360.

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a Jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman. She continued to repeat, rationally and uniformly, the facts which she had disclosed from the moment her senses returned, until her tongue was no longer capable of performing its office. Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury, under all the circumstances of the case. His Lordship then left it with the Jury to consider, whether the deceased was not in fact under the apprehension of death, though she did not seem to expect immediate dissolution; and said, that if they were of opinion that she was, then the declarations were admissible; but that if they were of a contrary opinion, they were not admissible (*a*).

The prisoner was convicted, and executed on Monday, 19th January 1789.

(*a*) The same point occurred in Dingler's Case at Old Bailey September Session, 1791; and by Mr. Justice GOULD was decided accordingly upon the authority of this case. See *post*. In the case of Thomas Johns, who was tried at the Carmarthen Spring Session 1790, for the murder of Rachael his wife, the declarations of the wife, made between the time of the mortal blow and the death, were received in evidence, although it did not appear that she had *expressed* any apprehension of danger. It was objected that these declarations were not admissible, as it was not proved that she considered herself at the time as a dying person; the evidence not being express on that head: but that if the evidence were admissible, it ought to have been left to the Jury to consider whether she was at the time conscious of approaching death. But the Court was of opinion that the evidence of the state of her health at the time the declaration was made was sufficient to shew that she was actually dying, and that it was to be inferred from it that she was conscious of her situation; and gave no particular direction on the subject to the Jury, who found the prisoner guilty. But the case was saved, and in Easter Term, 1790, all the Judges agreed that it ought not to be left to the Jury to say whether the deceased thought she was dying or not; for that must be decided by the Judge before he receives the evidence; and if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound, or state of illness, that he was

sensible of his danger, the declarations are good evidence. 1 East's Crown Law, 357, 358. And the same point was again decided in the Case of Henry Welbourn, Lincoln Summer Assizes 1792, before MR. JUSTICE ASHHURST, on a case saved for the opinion of the JUDGES. 1 East's C. L. 360.

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WOODCOCK'S CASE.

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CASE CCXXXII.

THE KING *against* YOUNG AND OTHERS.

AT the Sessions at Bristol in the year 1788, four men, of the names of *Young*, *Randal*, *Mullins*, and *Osmer*, were tried on an indictment on the statute of 30 Geo. II. c. 24 (*a*).

To constitute an offence within the 30 Geo. II. c. 24. money or goods must be obtained by a *false pretence*, with an *intention to defraud*; but the pretence may relate to a *future transaction*; and if made by *one*, in *the presence of* and in *concert with* others, they may be all included *jointly* in the same indictment.

S. C. 3 Term. Rep. 98.

S. C. 2 East, 828, 833.

THE indictment consisted of four counts. The first count stated, That the defendants did, by false colours and pretences, falsely pretend to one *Thomas*, that *Young* had made a bet of Five Hundred Guineas with a Colonel in the Army, then at *Bath*, that one *Lewis* would, on the next day, *run*, on the high road, leading from *Gloucester* to *Bristol*, ten miles in an hour, and that *Young* and *Mullins* went each two hundred guineas in the bet, and *Randal* the other hundred guineas; and that under colour and pretence of having made the said bet, they obtained from *Thomas* the sum of Twenty Guineas, as a part of such pretended bet, with intent to cheat and defraud him thereof, whereas in truth and in fact no such bet had been made, against the form of the statute. The second count stated, that the defendants did pretend to *Thomas*, that *Young* had made the bet with *Osmer*. The third and fourth counts stated generally, that the defendants had obtained Twenty Guineas from *Thomas* by false pretences, without stating what those false pretences were.

THE defendants were found *guilty*, and sentenced, under the statute of 30 Geo. II. c. 24. to be transported for seven years; but they removed the indictment by *writ of error* into the Court of King's Bench, and assigned for error, that the offence, as described in all the counts of the indictment, was

(*a*) See 52 Geo. III. c. 64. by which this statute is extended.

1788. not an offence against either the 33 Hen. VIII. c. 1. the 30 Geo. II. c. 24. or the common law.

YOUNG'S CASE.

FIELDING *for the defendants* contended, FIRST, That this was not an offence at common law, but *a bare naked lie*, against which the common prudence of the prosecutor, if he had exerted it, was sufficient to guard: and also that the offence was not of a *public nature*. SECONDLY, That no person is specified in the first count with whom the wager is laid; it is only "with a Colonel at Bath." THIRDLY, The four defendants are charged *jointly*; whereas, from the nature of the transaction, they ought to have been charged *severally*. FOURTHLY, That the second count stated a distinct offence from that charged in the first count, *viz.* the bet in the first count is charged to have been made with a Colonel at *Bath*, and in the second count it is charged to have been made with *Osmer*, and therefore should have been the subject of another indictment. FIFTHLY, That as *the pretence* was not set forth in either the third or fourth counts, those counts were undoubtedly bad.

GRIFFITH, *for the Crown*, was stopped by the Court.

LORD KENYON, *Chief Justice*.—This indictment being founded on the statute of 30 Geo. II. c. 24. is different from a common law indictment. When the statute passed, it was considered to extend to every case *where a party had obtained money by falsely representing himself to be in a situation in which he was not, or by representing any occurrence that had not happened, to which persons of ordinary caution might give credit*. The statute of the 33 Hen. VIII. c. 1. requires a *false seal* or *token* to be used in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the statute 30 Geo. III. c. 24. introduced *another offence*, describing it in terms extremely general. It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it. In the present case four men came to the prosecutor, representing a wager as about to take place, that *William Lewis* should go a cer-

Rex *v.* Mason *ante*. 2 Term. Rep. 581.

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YOUNG'S CASE.

tain distance within a limited time; that they had betted upon the event, and should probably win: he was perhaps too credulous; but he gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction: the defendants, therefore, morally speaking, have been guilty of an offence. I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the Act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute. THE SECOND OBJECTION is, that the charge is imperfectly stated; but that is answered by the record. If the indictment did not inform the defendants what charge they were called upon to answer, the objection would be well founded. But it holds out to them sufficient intelligence of the offence imputed to them. It states the wager to be with "a Colonel at *Bath*;" perhaps his name was not mentioned, so that he could not have been described in the indictment with greater accuracy. But if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence. As to THE THIRD OBJECTION, this case is extremely different from that of *perjury*, to which it has been compared; because that depends on the very words which the person charged individually uses in a court of justice; and the words spoken by one cannot possibly be applied to another as falsely uttering those very words. I do not see how that could ever have been doubted (1). But in this case all the defendants went together to the prosecutor, and thus carried a greater degree of credit; and they all joined in the relation as of a thing within their own knowledge. If they were all present, each acting a different part in the same transaction, no rule of criminal proceeding will be violated by adjudging them guilty of the imposition *jointly*. I admit that offences are not to be charged in such a manner as will confound the evidence: but in cases where it is necessary that several defend-

2 Term Rep. 586.
1 Hawk. P. C. c. 71.
2 Burr. 1125.

(1) Rex v. Philips, 2 Stra. 921.

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See Rex v. Roberts, Carth. 226.

ants should be indicted jointly, and the evidence is complicated, it may be separated for each particular defendant, as was done in the case before MR. J. YATES at *Hereford*, in the trial of Mr. *Powell*'s murderers. THE FOURTH OBJECTION would be well founded, if the legal judgment on each count was different; it would be like a *misjoinder* in civil actions. But in this case the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but if it were not so, I think they may be joined in the same indictment.

ASHHURST, *Justice*.—As to THE FIRST OBJECTION, cases which happened before the passing of the 30 Geo. II. c. 24. do not apply to this case; for that statute created *an offence which did not exist before*, and I think it includes the present. The Legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind. The words of it are very general: "all persons who knowingly by *false pretences* shall obtain from any person money, goods, &c. with intent to cheat or defraud, &c." and we have no power to restrain their operation. With respect to THE SECOND OBJECTION, it seems that the charge is as certain as the nature of the thing would admit. THE THIRD OBJECTION would have been much stronger, if the charge had been laid *severally*; for if they all acted together, and shared in the same transaction, it could not have been said that one received the whole sum. Neither is there any foundation for THE LAST OBJECTION. Perhaps each count related to the same fraud, though it is charged differently. But if it were not so, I do not know any rule of law which prevents the joinder of two misdemeanors in the same indictment.

BULLER, *Justice*.—The FIRST OBJECTION is the one deserving the most consideration. The principles of the common law have been truly stated. To make an offence indictable at common law, it must be *public* in its nature; and the distinction which has been taken in the case of using false weights and measures, shews it more clearly than any other. If a person

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sell *by false weights*, though only to one person, it is an indictable offence: but if, *without false weights*, he sell, to many persons, a less quantity than he pretends to do, it is not indictable (*a*). But though the common law, as applicable to this subject, is as stated by the Counsel, in this case it is necessary to consider both the statutes of the 33 Hen. VIII. c. 1. and the 30 Geo. II. c. 24. By the first statute the offence consists in obtaining money or goods by *false tokens*; and unless some *token* be used, the case does not come within that Act. Now, suppose a token had been produced in this case, and that the defendants, after telling their story to the prosecutor, had said, "If you have any doubt, here is the Colonel's gorget," I think it would have fallen within the statute of 33 Hen. VIII. If it would, then let us consider what effect the 30 Geo. II. c. 24. has on the case. The Legislature thought that the former statute was too limited; and therefore the 30 Geo. II. c. 24. was passed, which enacts, that all persons who shall obtain money from others by *false pretences*, with intent to cheat or defraud such persons, shall *be deemed offenders against the public peace*. The statute therefore clearly extends to cases which were not the subject of an indictment at common law. The ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient; but some *pretence* must be used, and that pretence must be false; for the *intent* is necessary to constitute the crime. *If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute* (*b*). Very few cases on this Act of Parliament have been brought before this Court: but there was an indictment on this statute against *Count Villeneuve*, tried at *Chester* in the year 1778, which I have had occasion to mention here several times, and which I have never heard doubted or contradicted. That indictment was tried while I sat with MORTON, *Chief Justice*, on the Bench at *Chester*, of

(*a*) See Rex *v.* Wheatley, 2 Burr. Rep. 1125.

(*b*) See the observation of the Judges in Rex *v.* Pares, on this statute, 2 East, P. C. 689.

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whom all who remember him will bear testimony with me, that he was a very able Judge, and peculiarly cautious in criminal cases. The facts of that case were shortly these:—The defendant applied to Sir *T. Broughton*, telling him, that he was intrusted by the *Duke De Lauzun* to take some horses from *Ireland* to *London*, and that he had been detained so long by contrary winds that his money was spent. Sir *T. Broughton* was induced by this representation to advance some money to him: afterwards it turned out that the prisoner never had been employed by the *Duke De Lauzun*, and his whole story was a fiction. On that case the prisoner was convicted, and sentenced to hard labour on the *Thames*. Now that case goes the full length of deciding this. As to the three other objections, they admit of very easy answers. With respect to THE SECOND OBJECTION, that the charge is too general—in this stage of the proceeding the Court must take it, that the representation was made by the defendants in the same manner that it is charged in the indictment; and if that, though general, was sufficient to answer the defendant's purpose, we cannot say that it was too general. We are not to suppose that the Colonel's name was mentioned; and the prosecutor could not state it with greater particularity than the defendants used. THE THIRD OBJECTION is, that this is not a joint offence: but as this is the case of a misdemeanor, the case in *Burrow* (*a*) is a decisive answer to it. There

(*a*) Rex *v.* Benfield and Saunders, 2 Burr. Rep. 980. an information against five for riot and libel, on which three of them were acquitted of the whole charge, and Benfield and Saunders found guilty of the libel. It was objected that several distinct defendants charged with several and distinct offences, cannot be joined together in the same indictment or information, because the offence of one is not the offence of the other. But it was determined that several offences may be joined in one and the same indictment or information, if the offence wholly arise from such a joint act as is criminal in itself, without any regard to any particular default of the defendant which is peculiar to himself; as for instance, it may be joint for keeping a gaming-house, or for singing together a libellous song, but not for exercising trade without having served an apprenticeship, because each trader's guilt must arise from a defect peculiar to himself, and 2 Hawk. L. C. 140. was said to be clear and express in this distinction. See also Williams *v.* Custodes, Styles, 244, 312.

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LORD MANSFIELD said, "It is a strange thing if the King "cannot call a man to account for a breach of the peace, be- "cause he broke two heads instead of one." The present was, I think, a joint offence; it was a joint representation to answer one and the same purpose. Neither is the proof several; it relates to one transaction. This is not like the case of a *conspiracy*, where the whole story must be taken up in detached pieces, at different times, to charge the different actors. But here it is the entire act, which they were all carrying on in concert together. If, however, any authority were necessary, a case happened about a year ago (1) which is stronger than the present. Three persons were indicted on the Black Act for shooting at the prosecutor; they were all charged with *the single act*, and the indictment was held by all the Judges of *England* to be sufficient. As to THE FOURTH OBJECTION, that is founded on a point which once embarrassed me a great deal. Some years have elapsed since I looked into it, but I believe I can state pretty accurately how it stands. In *misdemeanors* the case in *Burrow* (2) shews, that it is no objection to an indictment that it contains several charges. The case of *felonies* admits of a different consideration; but even in such cases it is no objection in this stage of the prosecution. On the face of an indictment every count imports to be for a different offence, and is charged as at different times; and it does not appear on the record whether the offences are or are not distinct. But if it appear, before the defendant has pleaded, or the Jury are charged, that he is to be tried for separate offences, it has been the practice of the Judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the Jury; for he might object to a Juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the Judge, who tries the prisoner, do not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last Sessions at the *Old Bailey*, and I hope that, in exercising that discretion, I did not infringe on any rule of law or justice,

(1) See the Case of Gibson, Mutton, and Wiggs, *ante*, p. 357. Case 174.

(2) Rex v. Benfield and Saunders, 2 Burr. Rep. 984.

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But if the case has gone to the length of *a verdict*, it is no objection *in arrest of judgment*: if it were, it would overturn every indictment which contains several counts. So where the evidence affects several prisoners differently, I have, as was done by Mr. J. YATES, at *Hereford*, selected the evidence as applicable to each, and left their cases separately to the Jury. And in a case which happened before me on the last Spring Assizes at *Exeter*, where two prisoners were indicted for murder, and evidence was given which pressed very hard on one prisoner, but was not admissible against the other, I thought it the soundest way of administering justice to sum up the evidence, and take the verdict against each separately. But all these are mere matters of *discretion* only, which Judges exercise in order to give a prisoner a fair trial; for when a verdict is given, they are not the subject of any objection to the record.

GROSE, *Justice*.—My brother BULLER has given a decisive answer to the first objection. The statute created *a new offence*; for it declares, that all persons obtaining money by *false pretences* with an intent to cheat, shall be deemed offenders *against law* and the public peace. That particular offence is made an offence against law, whether it was so or not before; and I am clearly of opinion that this case comes within the Act of Parliament. As to THE SECOND OBJECTION; it must be taken *after verdict* that the offence was proved as it was laid in the indictment; and if so, it could not have been charged in any other way. It is perfectly immaterial whether the name of the Colonel at *Bath* was or was not mentioned, since the defendants obtained the prosecutor's money by this representation. THIRDLY, With respect to the defendants being charged *jointly*, every crime which may be in its nature joint may be so laid. Here it is stated, that all the defendants committed this offence, by all joining in the same plan: they were all jointly concerned in defrauding the prosecutor of his money; and the offence being joint in its nature, it could not be laid with so much propriety in any other manner. On THE LAST OBJECTION, I am clearly of opinion, that it is no objection *in arrest of judgment* that the

indictment charges several offences. The different counts in the indictment always state the offence as separate offences: and if this objection were to prevail, every indictment which contains two counts must be bad. It is no objection, I conceive, even in the case of *felonies*; still less is it so in *misdemeanors*.

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THE judgment was affirmed.

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CASE CCXXXIII.

THE KING *against* SHERRINGTON *and* BULKLEY.

In what name an indictment of larceny must lay the property, when it resides in *Trustees* under an Act of Parliament, such Trustees not being *incorporated*.

AT the Old Bailey February Sessions 1789, the prisoners were indicted on the statute 21 Geo. III. c. 68. for stealing a quantity of lead affixed to the WORK-HOUSE of the Poor of the Old Artillery Ground; and the property was laid to belong to "*the Trustees of the Poor of the Old Artillery Ground.*"

BY an Act of Parliament passed 14 Geo. III. c. 30. certain persons therein named, and their successors, to be elected and appointed under and by virtue of the said Act, are appointed TRUSTEES for putting in execution all the powers thereby given for providing a Work-house, and for employing and maintaining the poor of the said Old Artillery Ground, or for any matter or thing concerning the same; and all *fixtures*, furniture, and other things bought or provided for the use of the poor, are vested in the said Trustees and their successors, for the purposes of the Act. And then it goes on in these words: "And the said Trustees are hereby empowered to prefer or order the preferring of any bill or bills of indictment against any person or persons who shall steal, take, or carry away any or any part of such things; and the monies and things which shall be so stolen, taken, or carried away, shall in every such indictment be laid, and deemed, and taken to be the property of *the Trustees of the Poor of the Old Artillery Ground.* And every indictment so preferred shall be held good in law to all intents and purposes."

THE QUESTION was, Whether the indictment had well

1789. laid the property as belonging to "*the Trustees of the Poor of the Old Artillery Ground?*"

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THE COURT held that it had not; for as the Act of Parliament had not *incorporated* the Trustees, and by that means given them collectively *a public name*, the property should have been laid as belonging to *A. B. C.* &c. by their proper names, and the words "*Trustees of the Poor of the Old Artillery Ground*," subjoined as a description of the capacity in which they were authorized by the Legislature to act.

See Patrick and Pepper's Case, *ante*, page 253. Case 127.

CASE CCLXXXIV.

DENBY'S CASE.

A GRAND JURY cannot, on a suspicion that the witness has been tampered with by the prisoner, receive in evidence *his written examination*, in lieu of his *parolę testimony*, for the purpose of finding a bill.

AT the Gaol Delivery for *Kingston* in the county of *Surry*, on Thursday 26th March 1789, *John Edwards* was in the calendar of commitments on a charge of having burglariously broken and entered the palace of his Grace the *Archbishop of Canterbury* at *Lambeth* in that county.

ONE *Denby*, a witness, whose information before the Magistrate had been taken in writing, pursuant to the statutes of 1 & 2 Philip and Mary, c. 13. and the 2 & 3 Philip and Mary, c. 10. on being produced before THE GRAND JURY, prevaricated in such a manner as to induce a very strong suspicion that he had been tampered with on the behalf of the prisoner.

THE Grand Jury therefore applied to the Court for *the depositions* taken before the Magistrate.

Gould, J. Hotham, B.

BUT the COURT were of opinion, That as the best evidence was the *vivâ voce* testimony of *Denby* himself, they could not abandon that, and resort to the secondary kind of evidence resulting from his written deposition; and on this ground the application was refused (*a*).

(*a*) A similar application was refused by MR. J. GOULD at the last Essex Assizes.

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THE KING *against* WINIFRED AND THOMAS GORDON. CASE CCXXXV.

AT the Spring Assizes at *Northampton* in the year 1789, *Winifred Gordon*, the wife of *Francis Gordon*, and *Thomas Gordon*, their son, were tried before MR. BARON THOMPSON for the wilful murder of *George Linnel*.

On an indictment for the murder of a *Constable* in the execution of his office, it is not necessary to produce his *appointment*; it is sufficient if it be proved that he was *known to act* as Constable. S. C. 1 East, 312, 315.

A person indicted as *an accessary before* the fact, cannot be convicted of that charge upon evidence proving him to have been *present*, aiding and abetting. S. C. 1 East, 552.

THE indictment consisted of two counts. The FIRST COUNT charged, That *Thomas Gordon* and *Winifred Gordon*, on the 23d July 1788, at the parish of *Pattishall*, in the county of *Northampton*, in and upon one *George Linnel*, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault (he the said *George Linnel* then and there being *Constable* of the said parish of *Pattishall*, in the said county of *Northampton*, and in the due execution of his said office); and that the said *Thomas Gordon*, a certain gun, &c. to and against the said *George Linnel*, *&c.* feloniously, wilfully, and of his malice aforethought, did shoot and discharge, &c. thereby giving the said *George Linnel* one mortal wound, &c. of which said mortal wound the said *George Linnel* then and there instantly died. AND THAT the said *Winifred Gordon*, before the said felony and murder aforesaid by the said *Thomas Gordon*, in manner and by the means aforesaid, done and committed, to wit on the said 23 July with force and arms at, &c. then and there feloniously, wilfully, and of her malice aforethought, did incite, move, instigate, stir up, counsel, direct, advise and command him the said *Thomas Gordon* the felony and murder aforesaid, in manner and by the means aforesaid, to do and commit; and then concluded that both the prisoners "in manner and by the means aforesaid, then and there feloniously, and of their malice aforethought, did kill and murder the said *George Linnel*, *&c.*" THE SECOND COUNT charged the prisoner *Thomas Gordon* as a principal, and the prisoner *Winifred Gordon* as an accessary before the fact, in the murder of the said *George Linnel*, omitting the allegation that he was a Constable in the due execution of his office.

1789. THE following facts appeared in evidence. The prisoners, *Thomas* and *Winifred Gordon*, were the wife and son of Mr. *Francis Gordon*, Surgeon to the 66th Regiment of Foot. In the year 1785 the regiment was ordered to *St. Vincent's*, but Mr. *Gordon* being upwards of sixty years of age, and in an infirm state of health, chose to retire from the service. In the beginning of the year 1786 he purchased a small freehold estate in the village of *Pattishall* in *Northamptonshire*, on which he soon afterwards went to reside with his wife and son. To employ his son, who was at this time about seventeen years of age, he converted the lower part of his house into a shop, which he stocked with mercery and drapery goods, and gave the management of it to his wife and son. On the 22d July 1788, Mr. *Francis Gordon* being at a public-house at *Towcester*, about four miles from *Pattishall*, a quarrel arose between him and one *Haines Pratt*, a blacksmith of *Pattishall*; and after a long and violent altercation, *Pratt* struck Mr. *Gordon* on the head with his fist; upon which Mr. *Gordon* drew a long sword from a cane which he had in his hand, and pointing it at him, told him to keep off; but whether *Gordon* ever touched *Pratt* with its point did not appear. *Pratt* however, on the ensuing day, procured a warrant from Mr. *Eccles*, a Justice of the Peace, to apprehend Mr. *Francis Gordon*; which warrant was as follows: "NORTHAMPTONSHIRE. TO THE CONSTABLE of *Pattishall*. Forasmuch as *Haines Pratt*, of *Pattishall*, in the said county, hath this day made information and complaint before me, *John Eccles*, one of his Majesty's Justices of the Peace in and for the said County, that *Francis Gordon*, of *Pattishall*, in the said county, did stab with a stick armed with steel, called *a snicker snee*, and wound him, the said *Haines Pratt*, at the sign of the Boot: THESE ARE THEREFORE to command you, in his Majesty's name, forthwith to apprehend and bring before me the body of the said *Francis Gordon*, to answer unto the said complaint, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal the 23d day of July, in the year of our Lord 1788." This warrant was delivered by *Pratt* to one *Hart*,

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who was Thirdborough of the parish; but he, not chusing to execute it, returned it immediately to *Pratt*, who delivered it to *Linnel*, as the Constable to whom it was directed (*a*); and on the 23d July, about seven o'clock in the afternoon, *Linnel*, accompanied by one of his labourers, whom he had commanded to aid and assist him in executing the warrant, proceeded, for that purpose, to Mr. *Francis Gordon*'s house. On their arrival Mrs. *Gordon* was standing at the door. They asked her if Mr. *Gordon* was at home? She asked them, What they wanted with Mr. *Gordon? Linnel* told her that he, as Constable of the parish, had a warrant against Mr. *Gordon* at the suit of *Pratt*, and requested that he might be let into the house to see if he was at home or not. Mrs. *Gordon* assured them that her husband was not at home; but they not being satisfied with this answer, insisted upon searching the house. At this period the prisoner *Thomas Gordon*, her son, came to the door, saying, "The first man that enters the door of my ground I'll end his life;" and shutting the outer door, retired into the house. *Linnel* and his assistant removed a few paces from the door, and on turning round to look at the house, saw the two prisoners at the windows up stairs. *Linnel* then returned again towards the door, in order to see if it was fastened; but on his approaching, the prisoner *Thomas Gordon* held a gun out of the window, during which time the other prisoner *Winifred Gordon* was heard to say that they had plenty of ammunition, and that the first man who attempted to break in should lose his life. Their conduct brought a great crowd of people about the house, and a conversation took place about deferring the service of the warrant until the morning, Mrs. *Gordon* telling *Linnel*, that as her husband was a freeholder of the county, and had considerable property on the premises, there was no danger of his running away on so trifling a charge as an assault; and the hour of nine the next morning was appointed for *Linnel* to see Mr. *Gordon*. *Linnel* and his followers went

(*a*) That a warrant must be executed by the party to whom it is directed. See Browning's Case, 1 East, C. L. 312. Dixon's Case, coram Dennison J. Kingston Assizes, 1756 or 1758. 1 East, C. L. 313. Borthwick's Case, Dougl. 207.

1789. away down *Pattishall-lane*, as if he intended to return to his own house; but he soon after returned, with several men whom he had commanded to aid and assist, and told one *Burton*, whom he had left to keep watch, that he was determined to get into the house. For this purpose he and five others went down the lane, got over Mr. *Gordon*'s wall into his garden, and were advancing to the back door of the house. The moment they had got over the wall *Thomas Gordon* put a gun out of the window. At this time the other prisoner, *Winifred Gordon*, was observed standing in the same room, immediately behind her son, saying to him, "Fire, Tom, fire! Kill them! Kill them!" The gun was immediately discharged, and the contents of it were lodged in the body of *Linnel*, who, from the wound he received, bled to death. On raising him from the ground the Constable's staff was found lying under his arm, and it was proved by several of the witnesses, that he was generally known as Constable of the parish (*a*). The people of the neighbourhood, irritated by the outrage which had been committed, immediately began to storm the windows of the house with stones and other weapons: but Mr. *Francis Gordon*, who had been all the while at home, and had desired himself to be denied, being unwilling to create further disturbance and mischief, opened the door and surrendered himself; and he was taken into custody. The two prisoners, his wife and son, were also taken into custody; and on these circumstances being disclosed before the Justice of the Peace, *Winifred* and *Thomas Gordon* were committed to gaol, to take their trial for the murder of *Linnel*.

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THE Jury on the trial found the prisoners *Guilty*; but several points of law having been submitted to the Court by their Counsel, the judgment was respited; and the case was

(*a*) On the conference of the Judges on this case, they were all of opinion that these circumstances were sufficient evidence and notification of his being constable, although there was no proof of his appointment, or of his having been sworn into the office, 1 East's C. L. 315. and of the necessity of a notification being made, *vide* Pew's Case, Cro. Car. 183. 1 Hale 583. and Rex *v.* Ricketts, Worcester Summer Assizes, before Lawrence J. 3 vol. Campbell's Rep. 68.

reserved for the opinion of THE TWELVE JUDGES on two questions. 1789.

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FIRST, Whether, as the indictment alleged that *Linnel*, the deceased, was the constable of the parish, it was not incumbent on the prosecutors to prove that fact, by shewing that he had been duly elected into the office (*a*)?

2 Hawk. 312. s. 7 and 8.

SECONDLY, Whether, as the evidence most clearly proved, that *Winifred Gordon* was, if any offender at all, a *principal* offender, she could be found guilty on such evidence, as an *accessary before the fact*; they being distinct and separate offences.

2 Hawk. 315. Sum. 47. 51. 217. Hale, P.C. 435. Foster, 347. 369. 3 Inst. 138. 4 Bl. Com. 34.

THESE points were argued by GALLEY *for the prisoners* and DAYRELL *for the Crown*, before THE TWELVE JUDGES at the Exchequer Chamber, on Wednesday the 24th June 1789.

Lord Kenyon, Lord Loughborough, Lord Chief Baron Eyre, Mr. J. Ashhurst, Mr. J. Buller, Mr. J. Grose, Mr. J. Gould, Mr. J. Heath, Mr. J. Wilson, Mr. B. Perryn, Mr. B. Thompson.

MR. BARON HOTHAM at the Assizes held for the county of *Northampton*, on the 23d July 1789, ordered the prisoners to be put to the bar, and informed *Winifred Gordon*, that by the unanimous opinion of THE JUDGES she was discharged from the indictment (*b*), but that with respect to *Thomas*

(*a*) In an action of slander by *an attorney*, stating himself to be so in the declaration, it was objected that he had not proved that fact by the production of his admission, or by a copy of the roll. But *per* BULLER J. In the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters without producing their appointments, and that even in the case of murder, Berryman *v.* Wise, 4 Term Rep. 366. See also Radford *v.* Mackintosh, 3 Term Rep. 632, 637.

(*b*) Mr. East states from MR. JUSTICE BULLER'S manuscript note of this case, that after argument in the Exchequer Chamber, it seemed to be the opinion of all the JUDGES, though they differed in other respects, that this indictment only amounted to a charge, as against *Winifred Gordon*, of being an accessary before, though it charged her, as it should seem improperly, with having joined in the assault against the deceased: and indeed the counsel for the prosecution admitted that it must be so considered upon the authority of Haydon's Case, 4 Co. 42. b.; where it is holden necessary to charge a principal in the second degree with being present, aiding and abetting. But it was the opinion of all the JUDGES, that she might be indicted again as principal; in which the four concurred, if, as the others thought, she could not be convicted on this indictment charging her as accessary before the fact. S. C. 1 East, 352.

1789. *Gordon*, they were of opinion that the case was fully and properly proved against him.

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SENTENCE of death was accordingly passed upon him; but at the earnest intreaty of his Counsel, execution was respited until a future day. During this interval great interest was made to procure a pardon; but on Tuesday the 5th August 1789, he was executed pursuant to his sentence.

CASE CCXXXVI. THE KING *against* JOHN WILKINS.

To obtain goods by *false pretences* from the servant of the owner, to whom they were delivered, for the purpose of being carried to a customer who had purchased them, is a taking from *the possession* of the master; and, if so taken, with a preconceived design to steal them, amounts to felony.
S. C. 2 East, 673.

AT the Old Bailey April Session 1789, *John Wilkins* was indicted for stealing thirty-six pair of silk stockings, and twelve pair of thread stockings, the property of *William Wayte*. The Jury found the following facts, and the case was reserved for the opinion of THE TWELVE JUDGES.

CASE. The prosecutor Mr. *Wayte* was a Hatter and Hosier, in *Panton-street*, in the *Hay-market*. On the 9th February preceding the trial, he delivered two parcels, containing the goods mentioned in the indictment, to his apprentice, with directions to carry them to the house of Mr. *Heath*, a hosier in *Milk Street, Cheapside*. As the apprentice was going up *Ludgate-hill*, with the parcels under his arm, he was met by the prisoner at the bar, who asked him where he was going? to which the apprentice answered, "*To Mr. Heath's.*" The prisoner, producing a small parcel, replied, "I know your master, and I owe him for those parcels. I was going for them to your shop; therefore do you give me your parcels and take this back to your master. There is a letter inside, and it must be immediately forwarded to Mr. *Brown.*" The apprentice accordingly consented to the proposed *exchange*, and delivered the two parcels for Mr. *Heath* to the prisoner, and the prisoner delivered his parcel to the apprentice. The prisoner having effected this exchange, endeavoured to separate himself from the apprentice; but his

manner created a slight degree of suspicion in the apprentice's mind, who, to satisfy his doubts, ran after the prisoner, and asked him if he was the Mr. *Heath* to whose house he was conveying the parcels? The prisoner replied that he was Mr. *Heath*; and desired the apprentice to make haste home with the other parcel. The parcel which was delivered by the prisoner contained a collection of old rags of no value; and he was not the Mr. *Heath* he pretended to be.

THE Jury were of opinion, that the prisoner, by falsely pretending that he was going to the house of the prosecutor for Mr. *Heath*'s parcels, had contrived to make this *exchange of parcels*, with an intent *wrongfully* to obtain and convert to his own use the goods mentioned in the indictment; and therefore they found him *Guilty*. The Court, however, being doubtful whether, under all the circumstances, the crime amounted to *felony*, the judgment was respited, and his case referred to the consideration of THE TWELVE JUDGES.

MR. JUSTICE GOULD, on the first day of February Session 1790, ordered the prisoner to be put to the bar, and delivered the opinion of the Judges to the following effect: The circumstances which appeared in evidence upon the trial of this indictment form a kind of case upon which a variety of opinions have been entertained, whether it amounts to *felony* or *fraud*; and the learned RECORDER, before whom the prisoner was tried, very properly referred it to the consideration of the Judges, in order that the point might be deliberately settled. On the first day of Hilary Term 1790, TEN of THE TWELVE JUDGES assembled to consider of this case, and they were unanimously of opinion, that the conviction is right. The observations which were made in support of that opinion, as far as they occur to me, I shall now state; and if my learned brothers (1) who are now on the bench, and who were both of them present when this unanimous opinion was given, should think that I carry this matter too far, they will give such explanation as may strike their minds. No case exactly like the present in point of fact has, I think, ever before arisen; but the principle on which it depends has been long known, and frequently recognized,

(1) Mr. Justice Grose, and Mr. Baron Thompson.

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viz. That to constitute the crime of larceny the property must be feloniously taken from *the possession* of the owner. The decision of this question therefore turns upon the consideration whether, at the time the prisoner obtained these goods from the *actual possession* of the apprentice, they were not, in contemplation of law, in the *constructive possession of* the master. FIRST, It seems to me to be clearly settled, that the possession of personal chattels follows the right of property in them: thus, in the case of *Hudson* v. *Hudson* (1), the plaintiff, as an executor, brought an action of trover, and declared that the testator was possessed of certain goods mentioned in the declaration; and that after his death they came to the hands of the defendant, who had converted them to his own use. The defendant was found *Guilty;* and it was moved in arrest of judgment, that it did not appear that these goods ever were in the possession of the plaintiff, but on the contrary, that after the testator's death they were in the hands of the defendant. But LORD CHIEF JUSTICE HYDE and the rest of the Court (2) unanimously gave judgment for the plaintiff, because although it was not alleged that he was actually possessed of these goods, yet upon the matter disclosed by the declaration, the law said that he was possessed; for the right of property draws with it the actual possession of goods, so as to intitle the owners of them to *trespass:* as if a man in *London* give me his goods which are at *York*, and a third person take these goods away, I may maintain an action against him for a *trespass.* It appears therefore from this case to have been the solemn opinion of Judges of high character and reputation, that the possession in the case of personal chattels follows the property; and to this opinion I entirely subscribe. SECONDLY, It is a rule of law equally well known and established, that the possession of the true owner cannot be divested by a tortious taking; and therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property, because these acts of theft do not change the possession of

(1) Latch. 214.

(2) Doderidge, Jones and Whitlocke.

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the true owner. THIRDLY, These doctrines will also, in my opinion, hold where the goods are taken from the possession of the true owner by means of *fraud*; for otherwise a man might derive an advantage from his own wrong. Various opinions formerly prevailed whether servants, having the *custody* of their masters' goods, were guilty of felony by fraudulently embezzling them, and converting them to their own use; but the statute 21 Hen. VIII. c. 7. which makes this offence *felony*, does not say that it was not felony before by the common law, but only recites that the matter had been doubted; and this Act of Parliament did not, in my judgment, mean to weaken, but to assist the common law. Ever since this Act therefore, the opinion of those who before the Act held that servants embezzling their masters' property was felony, has been confirmed. Thus in the case of a butler, or other servant, to whose care a master entrusts his plate or other goods, it has uniformly been held, that such servants are guilty of felony by embezzling such plate or goods, or taking them fraudulently away: and this doctrine is not confined to menial servants only; for it appears both by *Hale* and *Hawkins*, that if a shepherd, who has the care of sheep, and who, from the nature of his employment, must be constantly in the pastures, take away any part of the flock with intent to steal it, he is guilty of felony, although in both cases the plate is actually delivered to the butler, and the sheep to the shepherd, for *the possession* still remains in the master. And this law prevails in all cases where servants have not the absolute dominion over the property, but are only entrusted with the care or custody of it for a particular purpose. Very soon after I had the honour of sitting on the bench, the case of *The King* v. *Paradise* came before me at the Lent Assizes for *Salisbury* 1766. The prisoner was foreman to Mr. *William Perriam* a mercer at *the Devizes*, and he also kept his books in the capacity of book-keeper on a yearly salary, and paid and received money for him as keeper of his cash accounts, but he did not live in his master's house, but went there every day to transact his business. Mr. *Perriam* had delivered bills to him to the amount of 1500*l.* with di-

2 East, 565. 567.

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rections to inclose them in different covers, and send them by that day's post to his correspondent in *London*, as cash to be carried to the credit of Mr. *Perriam's* account; but instead of so doing he secreted them to his own use, changed one of them at *Salisbury*, which bill was indorsed both by Mr. *Perriam* and the prisoner, and the next day, being *Sunday*, under pretence of visiting some relations in the neighbourhood, ran off with them, but was apprehended with part of the bills in his custody at *Topham* in *Devonshire* in his way to *France*. The late LORD ASHBURTON, then Mr. *Dunning*, and some other gentlemen of eminence at the bar, were Counsel for this man on his trial; and they contended, that as the prosecutor had delivered these bills to the prisoner, he had thereby parted with the possession of the property, and therefore the prisoner could not be guilty of felony in taking them away; and he resembled it to the case of a carrier, who is intrusted to carry goods, but to which I thought it bore no resemblance; for my idea was, that the possession of the master had not in any way been changed, and that it was just the same as if he had stolen the bills out of his master's desk. The Jury found the prisoner *Guilty*; but at the request of his Counsel, I reserved the case, and THE JUDGES unanimously concurred in the opinion I had given, that the possession of this bill still continued in Mr. *Perriam*.

See Rex *v.* Bass, *ante*, p. 251. Case 125.

In Michaelmas Term 1782, one *William Bass* (and I have the case here) was indicted for stealing a quantity of goods to the value of eighty pounds, the property of one *John Gatfee*. The prisoner was porter in the general employ of the prosecutor. The prosecutor had delivered the parcel containing the goods mentioned in the indictment to the prisoner, to be carried to a customer; but in his way to the place where the customer lived, he met two men, who prevailed with him to go into a public-house and to dispose of the goods; which they accordingly did, and the prisoner received eight guineas as his share of the produce. The question was, Whether this amounted to a felonious taking? It appears from a note at the end of the case, that the goods were taken out of a sack by the two men, delivered to the

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1 Hale 504. 1 Hawk. ch. 33. sect. 5. 7. 3 Inst. 107. Staunf. 25. 1 Bacon's Abr. 557. 4 Bl. Com. 30.

prisoner, and put by him into a brown bag; and therefore from these last circumstances, this case furnished a colour for the distinction that has been taken in the case of *a Carrier*, viz. If a Carrier run away with the whole bale intrusted to his care, he is not guilty of felony; but if he open it, and take away part of its contents, then he will be guilty of felony. The case of a Carrier is of a peculiar nature; for by the engagement which he enters into to carry them, he acquires a sort of special property in the goods; he is in all cases whatever liable to a civil action for the loss of them, except that loss happen from public commotions, or the act of God; but on the consideration of this case the Judges did not think that even these circumstances made any material difference; and my manuscript, which I put down the same evening, on my return from Lord Mansfield's Chambers, is, that the Judges were unanimously of opinion that *Bass* had been legally convicted, for that the prisoner being a servant, and the goods being delivered to him to carry to a customer, the possession of the goods still remained in the master (*a*). In the same manuscript I perceive that I have noticed *Paradise's Case* as having been decided upon the same principle; and the accuracy of this manuscript is confirmed by a note which I have seen of *Bass's Case* taken by Mr. Justice Buller, which exactly corresponds with mine, except only this addition, "that the prosecutor had a power to countermand the delivery of these goods to the customer;" and there cannot be a stronger argument used to prove that the possession continued unaltered in the master. Now, to apply the principle of these two determinations to the circumstances of the present case, it appears to me, that the prisoner having obtained these goods fraudulently from the apprentice, is just the same as if he had obtained them from the actual possession of the master; and is just the same thing as if he had gone into the prosecutor's shop, and taken them from the counter, or from his window, and immediately run

(*a*) That was the ground of the determination as appears from Mr. Justice Buller's manuscript.

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(1) Raym. 375.

away with them. There is in *Sir Thomas Raymond's* Reports (1) the Case of one *Abraham Chiffers*, who went into the shop of *Ann Chatteris*, and asked to see two laced cravats; which she shewed to him, and *delivered them into his hands*, and thereupon he asked the price of them; to which she answered, seven shillings; he said he would give her three shillings, and immediately ran out of the shop, and took the goods away with him, openly in her sight. The question was, Whether this was *felony?* And SIR THOMAS RAYMOND was of opinion that it was felony, and exactly the same as if he had snatched it from the counter, and run away with it.

(2) *Ante*, page 212. Case 105.

The more recent case of *Rex* v. *Pear* (2) is in point. *Pear* went into *Smithfield*, and chaffering for a horse, at last desired that he might be permitted to try its paces; and when the owner delivered the horse to him for this purpose, he mounted, and clapping his spurs to its sides rode away with it. Now the circumstances of the present case are much stronger than those in *Pear's Case*; yet that was held to be felony; and many other cases of obtaining goods under false pretences, with a preconceived design to steal them, have been held to be felony. The taking from the hands of the apprentice, is a taking from the possession of the master; and the artful contrivance made use of is evidence of the intention with which they were so taken. The Jury have found that the intention was felonious; and therefore I concur, upon these reasons, in the opinion which the Judges have delivered in this case, that the conviction is right, and the verdict of *Guilty* must stand as it is recorded.

Sed vide Cockwaine's Case, *ante* page 498. Case 230.

THE prisoner accordingly received sentence at the end of the Session, to be transported for the term of seven years, to commence from the time of his conviction.

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CASE CCXXXVII.

To constitute the offence of maliciously maiming cattle under the Black Act, it must appear that the maiming was committed from a malicious motive to *the owner* of the cattle.

S. C. 2 East, 1072.

THE KING *against* CHARLES PEARCE.

AT the Summer Assizes for Gloucester 1789, *Charles Pearce* was tried before MR. JUSTICE HEATH on the statute 9 Geo. I. c. 22. for a capital felony, for that he feloniously, unlawfully, wilfully, and maliciously did maim and wound A Cow belonging to the prosecutor.

IT appeared in evidence, that the prisoner had attempted to commit beastiality with the cow, and because she would not stand quiet, had, in a passionate manner, run a sharp-pointed stick quite through her body. On his examination before the Magistrate he admitted the fact, and declared that he should not have hurt her if she would have permitted him to have accomplished his desires.

THE LEARNED JUDGE was of opinion, that this species of evidence was not sufficient to warrant a conviction upon this indictment, for that to bring an offender within the meaning of this branch of the statute 9 Geo. I. c. 22. it was necessary to shew that the maiming of the animal was done from some malicious motive towards the owner of it, and not merely from an angry and passionate disposition towards the beast itself, without any intention of thereby injuring the owner (*a*).

THE prisoner was accordingly acquitted of the charge in this indictment, and tried upon another for the misdemeanor, on which he was convicted, and sentenced to two years' imprisonment.

(*a*) At the Old Bailey in September Session 1789, *John Hean* was indicted before Mr. JUSTICE HEATH on this statute, for that he on the 22d October 1788, maliciously and feloniously did maim and wound one gelding, price fifteen pounds, the property of THE KING; and it appearing on the evidence that it was done in a moment of passion, the learned Judge directed the Jury to acquit the prisoner, for that the offence consisted in maiming the animal out of malice to the master, and not in the exercise of a malicious disposition to the animal.—See also Shepherd's Case, O. B. October Session, 1790, before MR. BARON HOTHAM, *post*. But it is not necessary to give express evidence of previous malice against the owner in order to bring a case within the Act. Daniel Ranger's Case, 2 East's Pl. C. 1074.

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CASE CCXXXVIII.

THE KING *against* GAMLINGAY.

An indictment for not repairing a common highway leading *from* the parish of *A.* *to* the parish of *B.* is exclusive of *B.* although it afterwards allege that the part of the said road which was out of repair is *in* the parish of *B.*

AT the Summer Assizes at *Cambridge* 1789, the inhabitants of the parish of *Gamlingay* were convicted on an indictment for not repairing a highway; but in the Hilary Term following a rule was granted by the Court of King's Bench to shew cause why the judgment should not be arrested.

THE indictment stated, that "there was, and yet is a common and ancient King's highway leading *from* the parish of *Hatley, St. George*, in the county of Cambridge, *towards* and *unto* the parish of *Gamlingay*, in the county aforesaid, &c. AND THAT a certain part of *the same* King's common highway, called *Hatley-way*, situate, lying, and being in the said parish of *Gamlingay*, containing in length, &c. was, and yet is in great decay," &c.

THE objection was, that the road stated to be out of repair was not alleged with sufficient certainty to be in the parish of *Gamlingay*, as the allegation "leading *from* and *unto*" excluded the fact of its being *in* the parish; and a case from *Rolle's Abridgment* (1) was cited, where it is said, that if *A.* be indicted for stopping a way *at D.* leading *from D. to S.* that is not good, because the way is not alleged to be *in D.* but *from D.* which excludes the parish.

(1) 2 Roll. Abr. 81.

ON the other side it was contended, that the case cited only proved, that if a road be described as leading *from A. to B.* the *from* is exclusive of *A.* but does not prove that *B.* is excluded by the word *to* (2); and that as the latter part of the present indictment alleges the part of the road out of repair to be situate *in* the parish of *Gamlingay*, the Court would not arrest the judgment; for that if it appear upon the whole of an indictment that the unrepaired part of the road is within the parish, it is sufficient (3).

(2) 4 Burr. 2090. Cowp. 714. Dougl. 446.

(3) 1 Hawk. P. C. c. 76. s. 86. 3 Keb. 89. Latch. 183. 10 Mod. 383.

THE COURT was of opinion that the indictment was defective; for the defendants were only bound to repair that part of the road which lies within their parish. Now the road is described as leading *from* Hatley *unto* Gamlingay; and in the

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INHABITANTS OF GAMLINGAY CASE.

mond v. *Brewer* (1), where, on the construction of the 26 Geo. II. c. 54. for repairing the road *to* and *from* the town of *Battel* in *Sussex*, the question was, Whether the town of *Battel* was meant to be *included* or *excluded?* it was held that both were exclusive. The rule therefore was made absolute for arresting the judgment.

(1) 1 Burr. Rep. 376.

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CASE CCXXXIX.

THE KING *against* RHENWICK WILLIAMS.

RHENWICK WILLIAMS was tried at the Old Bailey on the 8th July 1790, before MR. JUSTICE BULLER, upon an indictment which stated, that he, on the 18th January 1790, at the parish of *Saint James* within the liberty of *Westminster*, in the county of *Middlesex*, with force and arms, at the parish aforesaid, in the county aforesaid, in the King's highway there, in a certain public street called *St. James's-street*, unlawfully, wilfully, maliciously and feloniously did make an assault upon *Anne Porter*, spinster, then and there being in the public street and King's highway aforesaid, in the peace of God and our said Lord the King, with an intent wilfully and maliciously to tear, spoil, cut, and deface the garments and clothes of her the said *Anne Porter*; and that the said *Rhenwick Williams, on the said 18th day of January*, in the thirtieth year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in the public street and King's highway aforesaid, unlawfully, wilfully, maliciously and feloniously did tear, spoil, cut and deface certain garments and clothes of her the said *Anne Porter*: TO WIT, One silk gown of the value of ten shillings, one pair of stays of the value of six shillings, one silk petticoat of the value of five shillings, one linen petticoat of the value of five shillings, and one linen shift of the value of five shillings, of her the said *Anne Porter*, then being part of the apparel which the said *Anne Porter* then and there had on her person and wore, the clothes. The assault upon the person, however may be prosecuted as a high misdemeanour by the *common law*. S. C. 1 East, 424.

To constitute an offence within the 6 Geo. I. c. 23. the assault and the injury to the clothes must be committed at one and the same time; and therefore an indictment on this statute must, in charging the offence, connect the acts by the copulatives "*then and there*;" but an intention to injure *the person*, although by the means used to carry such intention into execution, *the clothes* are thereby necessarily injured, yet it is not any offence within the Act; for there must be a *primary intention* to injure and punished.

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against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity."

THIS indictment was framed on the statute of 6 Geo. I. c. 23. s. 11. by which it is enacted, "That if any person or persons shall at any time or times, from and after the 24th June 1720, wilfully and maliciously assault any person or persons in the public streets or highways, with an intent to tear, spoil, cut, burn or deface, and shall tear, spoil, cut, burn or deface the garments or clothes of such person or persons, that then all and every such person and persons so offending, being thereof lawfully convicted, shall be, and be adjudged guilty of FELONY; and every such felon and felons shall be subject and liable to the like pains and penalties as in case of felony; and the Courts by and before whom he, she or they shall be tried, shall have full power and authority of transporting such felons for the space of seven years."

THE circumstances of this case, as they appeared in evidence on the trial, were as follow: The prosecutrix, *Miss Anne Porter*, was the daughter of *Mr. Porter*, the master of Pero's Hotel, in *St. James's-street*. On the evening of the 18th day of January 1790, being the Queen's birth-day, *Miss Anne Porter*, accompanied by one of her sisters and another lady, went to the Ball-Room at St. James's Palace, to see the company who were there assembled in honor of the day. The Queen seldom retires from the Ball-Room on a birth-night until past twelve o'clock, and *Mr. Porter* had appointed to meet his daughters at the Palace at that hour in order to conduct them home; but it so happened that the Queen on this particular night retired at eleven o'clock, and the *Miss Porters*, not having far to go, left the Ball-Room and proceeded by themselves towards their home. The prisoner at the bar had frequently before this time accosted the *Miss Porters* wherever he chanced to meet them, treating them with unmanly insults, and muttering the most abominable indecencies in their hearing. While they were walking up *St. James's-street*, *Miss Sarah Porter* perceived the prisoner close

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behind her, with his head quite over her shoulder, uttering in a low voice the most dreadful language that can be imagined. She instantly exclaimed to her sister, "Oh! for "God's sake make haste, the wretch is behind us." Upon which the prisoner gave her a violent blow on the back part of her head. The ladies immediately ran as fast as possible towards their own door, from which they were at this time at only a short distance. *Miss Sarah Porter* reached the door first, and on turning round, while she rang the bell, she perceived the prisoner close behind her sister *Anne*, stooping down; saw him strike with great violence; and heard the silk of her sister's gown tear. The door was opened, and the ladies rushed into the house. On examination it appeared that *Miss Anne Porter* had received a wound of nine or ten inches long, and at least three inches deep on her hip; that her gown was very much torn, and her two petticoats and shift cut quite through, just below the bow of the stays; and from the nature of the wound *Mr. Tomkyns* the surgeon deposed, that it must, in his opinion, have been inflicted with some sharp instrument. The prisoner was apprehended on the 18th June following, and in his defence endeavoured to prove an *alibi.*

THE LEARNED JUDGE, after having recapitulated the evidence that had been given, told the Jury, that to constitute an offence within the meaning of this Act of Parliament, it was necessary that the assault should be made, FIRST, in a public street or highway. SECONDLY, That it be made wilfully and maliciously. THIRDLY, That it be so made with an intent to tear, spoil, cut, burn or deface the garments or clothes of some person. And, FOURTHLY, That the garments or clothes of such person be actually torn, spoiled, cut, burned or defaced. That as to the first and last points it was clear, that some person had assaulted *Miss Anne Porter* in the public street, and given her a blow, which had not only cut her garments, but had wounded her person also; but that as the material ingredient in the present case was the *intention* with which this had been done, and the question of intention being in such case matter of fact for the Jury to find, and not a mat-

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ter of law for the Court to determine, it was necessary for them to consider as to the other points, FIRST, Whether the prisoner at the bar was really the person who made the assault? SECONDLY, If they should be of opinion that he was the person who made the assault, Whether it was made wilfully and maliciously? And, THIRDLY, Whether the assault was so made with an intention to tear, spoil, cut or deface the garments of *Miss Porter?* stating, that if his intent was to cut both the clothes and the person, and in carrying such intention into execution the clothes alone were cut, it would clearly be within the meaning of the Act: or if the intention was to injure the person only, and not to cut the clothes, yet if in carrying such intention into execution the assault was made with such an instrument, or under such circumstances as plainly shewed that the execution of the intention to injure the person must unavoidably tear, spoil, cut, or deface the clothes, they might consider whether a person who intends *the end* does not also intend *the means* by which that end is to be attained (*a*).

See Cook and Woodburn's Case, 6 State Trials.

(*a*) It seems that MR. J. BULLER, at the subsequent consultation of the Judges, retained the opinion he had given to the Jury, *viz.* that the case came within the statute, because the Jury, whose sole province it was to find the intent, had expressly found that the intent of the prisoner was to wound the party by cutting through her clothes, and therefore that he must have intended to cut her clothes; and for this opinion he relied upon the case of Cook and Woodburn, upon the statute 22 and 23 Car. II. c. 1. commonly called the Coventry Act, charging them in the words of the Act with an intention to maim a Mr. Crisp. The fact of maiming was clearly proved, but the defendants insisted that their intention was to murder him, and not to maim him, and therefore that they were not within the statute. But Lord King said that the intention was a matter of fact to be collected from the circumstances of the case, and as such was proper to be left to the Jury; and that if it was the intent of the prisoners to murder, it was to be considered whether the means made use of to accomplish that end and the consequences of those means were not likewise in their intention and design; and the Jury found them guilty and they were executed.—But it seems that upon a subsequent occasion WILLES, J. and EYRE, B. expressed some dissatisfaction with this determination, and thought, at least, that the construction ought not to be carried further. 1 East, 400 and 424.

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THE Jury found a general verdict of *Guilty*; but as there was some doubt as to the propriety of the form of the indictment, and as this was the first case that had occurred upon the Act of Parliament, the judgment was respited, and the case submitted to the consideration of THE TWELVE JUDGES upon the following questions.

FIRST, Whether it is not necessary, under this statute, that *the assault* and the *actual injury* to the clothes should be at one and the same time, the words of the statute being in the conjunctive, *viz.* If any person shall wilfully and maliciously assault any person with intent to tear, &c. AND shall tear, &c. the garments or clothes of such person?

SECONDLY, If it be necessary that the assault and the injury should be committed at one and the same time, Whether the indictment, after charging the *assault*, and then stating that "on the said 18th day of January, in the thirtieth year "aforesaid, with force and arms at the parish aforesaid, in "the county aforesaid, in the public street and King's high-"way aforesaid, did tear, &c." had sufficiently averred that the assault and the injury happened at the same time?

THIRDLY, Whether, under all the circumstances of this case, such an offence has been proved as is within the contemplation and intention of the Legislature at the time the statute of 6 Geo. I. c. 23. was passed?

ON the first day of December Session the prisoner was put to the bar, and the following opinion of the Judges was delivered by

MR. JUSTICE ASHHURST. *Rhenwick Williams*, the prisoner at the bar, was tried in last July Session on the statute of 6 Geo. I. c. 23. and the indictment charged, that he, *on the 18th January* 1790, at the parish of *St. James*, in a certain public street called *St. James's-street*, wilfully, maliciously, and feloniously did make an assault on *Anne Porter*, spinster, with intent wilfully and maliciously to tear, spoil, cut, and deface her garments; and that he, on that said *18th of January* 1790, in the parish aforesaid, &c. *did* wilfully, maliciously, and feloniously tear, spoil, cut, and deface her

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silk gown, petticoat, and shift, being part of the wearing apparel which she then had and wore on her person. The Jury found the prisoner *Guilty*; but the judgment was respited, and the case submitted to the consideration of the Judges upon three questions. A majority of the Judges are of opinion, upon all the questions, that this indictment is not well founded. FIRST, The words of the statute make it necessary that the assault and the tearing should be *at one and the same time*. SECONDLY, That the indictment is bad, because for any thing that appears on the face of it to the contrary, the assault may have been made on one part of the day, and the tearing of the clothes on another part of the day; for it does not say, after stating the assault at the time and place mentioned, that he *then and there* tore, spoiled, cut and defaced the clothes, but that he, *on the 18th January* 1790, at the parish of *St. James*, &c. made an assault; and *on the said 18th January* 1790, at the parish aforesaid, &c. did tear, spoil, cut and deface the clothes. Now the law in criminal cases requires the utmost precision, and will not permit a fact on which the life or liberty of a person depends to be made out merely by inference; for it is not enough to charge that the clothes were *cut* on *the same day* that the assault was made, which is all that the present indictment does; but it ought to have alleged that the clothes were cut at *the same time* that the assault was made with intent to cut them, by inserting the words *then and there*. THIRDLY, The Judges are of opinion, that the case, as proved, is not substantially within the meaning of the Act of Parliament. This statute was passed upon a particular and extraordinary occasion. Upon the introduction of Indian fashions into this country, the silk weavers, conceiving that it would be detrimental to their manufacture, made it a practice to tear and destroy the clothes and garments which were of a different commodity from that which they wove, and to prevent this practice the statute of 6 Geo. I. c. 23. was made. To bring a case therefore within this statute, the *primary intention* must be the tearing, spoiling, cutting, or defacing of the clothes; whereas, in the present case, the primary intention of the prisoner appears to have

See Buckler's Case, Dyer, 68. Rex *v.* Francis, Com. Rep. 478.

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been the wounding of the person of the prosecutrix. The Legislature, at the time they passed this Act, did not look forward to the possibility of a crime of so diabolical a nature as that of wounding an unoffending person merely for the sake of wounding the person, without having received any provocation whatever from the party wounded. But even upon the supposition that it was possible for the Legislature to entertain an idea of such an offence, it is clear they did not intend to include it within the penalties of this statute, because, if they had entertained such an idea, it is probable they would have annexed to it a higher punishment than this statute inflicts. As the Legislature therefore could not have framed this statute to meet this offence, it does not fall within the province of those who are to expound the laws to usurp the office of the Legislature, and to bring an offence within the meaning of an Act, merely because it is enormous, and deserving of the highest punishment. But although the lash of the Legislature does not reach this offence so as to inflict the consequences of *felony* on the offender, yet the wisdom of the Common Law opens a means of prosecution by indictment for the *misdemeanour*, and, on conviction of the offender, arms the Court with a power to punish the offence in a way that may force him to repent the temerity of so flagrant a violation of the rules of law, the precepts of social duty, and the feelings of humanity.

THE prisoner was remanded to his confinement in NEWGATE, and eight indictments were found against him on the several prosecutions of *Miss Anne Porter*, *Miss Sarah Porter*, *Mrs. Elizabeth Davis*, *Miss Elizabeth Baughan*, and four other ladies, for assaults and injuries similar to the one already described; but after he had been convicted on the prosecutions of *Miss Anne Porter*, *Mrs. Davis*, and *Miss Baughan*, the Counsel for the Crown declined giving any evidence on the indictments for the assaults on *Miss Sarah Porter* and the other ladies; declaring, that as these prosecutions were set on foot merely for the sake of public justice, and not from any motive of private or personal revenge, and as the ends of justice had been answered by the convictions that had

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already taken place, he was authorized to say, that MR. PORTER'S family, notwithstanding the injuries they had received, did not mean to prosecute him farther.

THE COURT therefore passed sentence upon the three indictments on which he had been tried and convicted, *viz.* That for the assault on *Miss Anne Porter* he be confined in his Majesty's Gaol of NEWGATE for the space of *Two Years:* For the assault on *Elizabeth Davis*, that he be also confined *Two Years*, to commence from the expiration of the former sentence: For the assault on *Elizabeth Baughan* that he be also confined *Two Years*, to commence from the expiration of the former *Four Years;* and that at the end of the said *Six Years* he find security for his good behaviour for *Seven Years*, himself in the sum of two hundred pounds, and two sureties in the sums of one hundred pounds each.

CASE CCXL.

THE KING *against* WILLIAM TURNER.

An indictment for a robbery on an unmarried woman in her *maiden name* is good, although she marry before the indictment is found.

AT Maidstone Summer Assizes 1790, *William Turner* was indicted for a highway robbery on the person of *Elizabeth Hudson.*

IT appeared on the examination of the prosecutrix, that she was unmarried at the time the robbery was committed, and that her name was *Elizabeth Hudson*, but that after the robbery, and at the time the bill was presented to and found by the Grand Jury, she was married to a person of the name of *Heywood.*

IT was objected that this had rendered the indictment erroneous.

BUT MR. JUSTICE GOULD, and L. C. B. EYRE, held the description by her maiden name, in this case, sufficient.

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CASE CCXLI.

THE KING *against* MARTHA JONES.

Two adjoining houses, belonging to two partners, of which the rent and taxes are paid from the joint fund, may still be the respective mansions of each partner, if there be no communication from one to the other but through the outer doors to the street.

S. C. 2 East, 504.

AT the Old Bailey in September Session 1790, *Martha Jones* was indicted before LORD CHIEF BARON EYRE, present MR. JUSTICE GOULD, for that she, on the 1st July, about the hour of one in the night, the dwelling-house of *Thomas Smith* AND *John Knowles* feloniously and burglariously did break and enter, and two pieces of gold coin called Guineas, of the goods and chattels of the said *Thomas Smith*, AND *John Knowles*, in the dwelling-house of the said *Thomas Smith* AND *John Knowles*, then and there being, feloniously did steal, take, and carry away.

THE prosecutors *Thomas Smith* and *John Knowles* were in partnership, and lived next door to each other. The two houses had formerly been one house only, but had been divided for the purpose of accommodating the respective families of each partner, and were now perfectly distinct and separated from each other, there being no communication from the one to the other without going into the street. The house-keeping, servants' wages, &c. were paid by each partner respectively; but the rent and taxes of both the houses were paid jointly out of the partnership-fund. The prisoner was servant to the prosecutor *Smith*, and in his house the burglary was committed.

See Tracy *v.* Talbot. 1 Salk. 182.

IT was objected, that although these two houses were the joint property of both the partners, yet they were the separate and respective mansions of each, and therefore the burglary, as proved in the present case, ought to have been laid as committed in the house of *Smith* only.

THE COURT conceived this objection to be well founded, and therefore the Jury were directed to acquit the prisoner of the *capital part* of the offence; and they accordingly found her guilty of the *simple larceny* only (*a*).

(*a*) At the Old Bailey, in January Session 1796, before MR. BARON THOMPSON, *George Parminter* was tried for stealing in the dwelling-house of *James Moreland*. It appeared that *Moreland* and one *Gutteridge* were co-partners, that *Moreland* was the lessee of the whole premises, and paid

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all the rent and taxes for the same; that *Gutteridge* had an apartment in the house, and allowed *Moreland* a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The felony was committed in *the shop*. It was contended that this gave to *Gutteridge* a joint possession of the shop and warehouses, and that it should have been so laid in the indictment, and on this objection the point was saved; but THE JUDGES were of opinion that the indictment was right, and the prisoner was transported.

CASE CCXLII.

THE KING *against* MARY DORAN.

Two indictments for the same offence, one for the *felony*, under a statute, and the other for the *misdemeanour* at common law, ought not to be preferred or found at the same time.

AT the September Session 1790, at *Hicks's Hall*, for the county of *Middlesex*, the managers of the Westminster Insurance Office preferred two indictments at the same time against one *Mary Doran*; the one for a FELONY at the common law, and under the 9 Geo. I. c. 22. for setting fire to and burning the house of *Daniel Mathews*, in *Little Russell-street*, *Covent-Garden*; and the other for a MISDEMEANOUR, charging, that she being possessed of the said house, as tenant for years to *Daniel Mathews*, did set fire to a certain room on the second floor in the said house, with intent to burn the houses contiguous and adjoining thereto.

THE GRAND JURY found both these indictments to be *true bills*; and the indictment for the *felony* was transmitted as usual, from *Hicks's Hall* to the *Old Bailey*, to be tried; but when the prisoner was put to the bar, the Counsel for the Crown, perceiving from the depositions which were taken before the Magistrate, that there was not sufficient evidence to sustain the charge of *felony*, stated to the Court, that as there was another indictment found against the prisoner for *the misdemeanour*, he should, under these circumstances, decline the prosecution for the capital offence.

EYRE, *Chief Baron*, expressed a strong disapprobation of the practice of preferring different indictments at the same time, on the same case, for *the felony* and *the misdemeanour*; and desired that notice might be sent to the Clerk of the Indictments at *Hicks's Hall* to prevent it in future. The Grand Jury cannot with propriety find two indictments for the same

offence at the same time, and the continuance of the practice may produce many inconveniences. 1790.

DORAN'S CASE.

THE KING *against* JOHN SHEPHERD. CASE CCXLIII.

AT the Old Bailey in October Session 1790, *John Shepherd* was indicted before MR. BARON HOTHAM, present MR. JUSTICE HEATH, on the statute 9 Geo. I. c. 22. for that he, on the 18th September, a bay gelding, the property of *Richard Bond*, feloniously, unlawfully, wilfully and maliciously did maim, by cutting the tongue of the aforesaid gelding three inches in length, against the form of the statute.

The act of maiming cattle, to make it a capital offence within the meaning of the 9 Geo. I, c. 22. must proceed from a malicious motive towards *the owner*. (*a*). S. C. 2 East, 1073.

THE prosecutor, *Richard Bond*, a farmer at *South Mimms*, in the county of *Middlesex*, was possessed of the bay gelding mentioned in the indictment, which was kept at grass in a meadow adjoining to the farm-yard. On the 19th September the animal was found lying in the meadow with its tongue hanging quite out of its mouth, and one part of it, which was quite dead, very nearly severed from the other (*b*). The prisoner was servant to the prosecutor, and had solicited him very earnestly to let him have another of the horses, called *Boxer*, to drive in the team instead of this gelding, which, at the time the mischief was done, was employed under the direction of the prisoner in carrying dung. The prisoner was seen holding the gelding by the tongue with one hand, while he beat him violently over the head with the but-end of a

(*a*) *Vide* the same point, Pearce's Case at Gloucester Assize 1789, before MR. JUSTICE HEATH. *Ante*, page 527. Case 237. And the same point was also decided by MR. JUSTICE HEATH in the Case of *John Kean*, Old-Bailey October Session 1789.

(*b*) To bring the offence within this Act it is not necessary that the animal should die in consequence of the maiming; for if it be proved that the prisoner, from malice to the owner, drive a nail into the frog of his horse's foot, so as to render the horse useless to the owner, yet it is a capital offence within the statute though the injury was not permanent, and the horse likely to recover; for the words of the statute are, "shall maliciously kill, maim or *wound*, &c." and the word *wound* appears to be used as contradistinguishing from a permanent injury such as *maiming*.—Heywood's Case, Coventry Summer Assizes 1801, before MR. JUSTICE ROOKE. 2 East, P. C. 1076.

1790.

SHEPHERD'S CASE.

whip which he held in the other; but there was no other evidence whatever that the prisoner had any malice against his master, except only that upon being remonstrated with on the barbarity of his conduct, he had declared, in the heat of his passion, that he would do the other horse an injury if his master did not let him have *Boxer* to go in the team; neither did the immediate cause of his resentment against the gelding appear.

THE COURT left it with the Jury to consider whether, under the circumstances of this case, the prisoner's conduct had been actuated by any motives of personal revenge against his master? or, Whether the brutality of his conduct had not proceeded from some sudden passion against the gelding itself, excited perhaps by some act of viciousness, or by its untractable disposition? (*a*) for that unless they were of opinion that it was done from a malicious motive against the owner of the gelding, however savage and cruel his conduct might appear, he could not legally be found guilty under this statute.

THE prisoner was acquitted.

(*a*) In a Case on this statute before MR. JUSTICE HEATH, it appeared that the prisoner had cut the tendons of the hinder legs of several sheep that had from time to time broke over into his inclosure, and it was holden not to be a case within the statute; for this was evidently resentment against the particular animals, and not from any personal malice against the owner. But it was agreed by the JUDGES in Daniel Ranger's Case, Surry Summer Assizes 1798, before BULLER, J. that it is not necessary in these cases for the prosecutor to prove a previous existing malice against the owner. 2 East's P. C. 1073, 1074.

CASE CCXLIV.

THE KING *against* JOHN CLINCH.

A forged order for the delivery of goods is not within the 7 Geo. II. c. 22. unless it be *directed* to the person who holds the goods; and it must appear in an indictment for this offence that the person whose name is charged to be forged, had an authority to make such an order, as the forged order purports to be. S. C. 2 East, 938.

AT the Old Bailey in January Session 1791, *John Clinch* was indicted before MR. BARON PERRYN, present MR. BARON THOMPSON, upon the statute of 7 Geo. II. c. 22. for forging an order for the delivery of goods.

1790.

CLINCH'S CASE.

THE indictment charged, "that on the 7th day of December, in the 31st year of Geo. III. *James Lewis Desormeaux*, of the parish of *Christ Church, &c.* silk-dyer, did deliver, and cause to be delivered to *Frances Purser*, wife of *James Purser*, of the parish aforesaid, &c. silk-dyer, seventy-eight pounds weight of raw silk, called Piedmont raw silk, of the goods and chattels of him the said *James Lewis Desormeaux*, to be sorted, marked, and divided into skains for dyeing; AND THAT *John Clinch*, late of the parish, &c. labourer, well knowing the premises, on the said 7th day of December, &c. feloniously did falsely make, forge, and counterfeit, and cause falsely to be made, forged and counterfeited, &c. a certain warrant or order for delivery of goods, with the name of *L. Desemockex* thereunto subscribed, purporting to have been signed by one *Lewis Desormeaux*, by the name and description of *L. Desemockex*, he the said *Lewis Desormeaux* then and there being *the servant* of the said *James Lewis Desormeaux*, in his said business of a silk-dyer, and purporting to be a warrant and order from the said *Lewis Desormeaux*, as such *servant* of the said *James Lewis Desormeaux*, for the delivery of eight pounds weight of the said raw silk, called Piedmont raw silk, parcel of the said seventy-eight pounds weight of the said raw silk called Piedmont raw silk, to the bearer of the said warrant and order: the TENOR of which said false, forged, and counterfeited warrant and order for the delivery of goods is as follows (that is to say):

"PLESE *to send by the*
"*Bearaer* 8 *Pound of*
"*that whorpe hun*
"*market*—

"L. DESEMOCKEX."

with intention to defraud the said *James Lewis Desormeaux*, against the form of the statute, &c." There was also A SECOND COUNT, for uttering this order knowing it to be forged, with the like intention; and A THIRD and FOURTH COUNT, for forging and uttering it with intention to defraud *James Purser*.

THE Prosecutor, *James Lewis Desormeaux*, was a black silk-dyer in *Spitalfields*, with whom the prisoner had, about

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a fortnight before this transaction happened, lived in the capacity of journeyman, or under-servant in the warehouse. *James Purser* was journeyman to *Mr. Desormeaux*, whose business, as to the receiving, weighing, dyeing, and sending out silk, was in general, but more particularly during his absence, under the direction of his son *Lewis Desormeaux*, who was at this time *an apprentice* to his father. On the 7th December 1790, *James Purser* tied up eighty pounds weight of Piedmont raw silk in a bag, which he delivered, about nine o'clock in the morning of the same day, to his wife *Frances Purser*, with directions to her for the foreman to mark it, and tie it up in proper skains for dyeing in colours. About twelve o'clock at noon of the same day, the prisoner called at *Purser's* house, and asked *Mrs. Purser* for eight pounds of the quantity of silk which she had to mark to be dyed in colours, saying, that he had been sent by *Mr. Hacker*, who was to dye it, to *Mr. Desormeaux*, and that *Mr. Desormeaux* had sent him to her for it; and producing at the same time the order for the delivery of it, upon which the indictment was founded. *Mrs. Purser*, not knowing the person of the prisoner, looked at the order, and asked him who wrote it: to which he replied, "*Master Lewis Desormeaux;*" whom she understood to be *John Lewis Desormeaux's* son, knowing that he had the management of this part of his father's business. *Mrs. Purser* accordingly read the note, and understood the words "*hun market*" to mean silk without the threads round it; and as she did not know the character of *Lewis Desormeaux's* hand-writing, nor the manner in which he spelt his name, but believing the order to have come from him, she, on the credit of this order, delivered eight pounds of the silk unwarped to the prisoner, who converted it to his own use. It was proved that *Mr. Hacker* had never given the prisoner any orders to fetch the silk; and both *John Lewis Desormeaux* the father, and *Lewis Desormeaux* the son, deposed that the order was not written by either of them, nor by any other person by their or either of their direction or permission.

KNOWLYS *for the prisoner* submitted three objections to the Court.

FIRST, ON the construction of the Act of Parliament.—

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To bring an offence within the meaning of this statute, the order must purport to be the order of a person who has an authority over, or at least claims an interest in, the money or goods which are the subject-matter of it, and who takes upon him to transfer the custody of them to the person in whose favour the order is made. Now, it is not averred in this indictment, that *Lewis Desormeaux*, whose order it is averred the present order purports to be, had any authority over, or any interest whatever in, those goods: it only states, that *John Lewis Desormeaux* was the owner of this silk, and that the prisoner, knowing that fact, had forged the order of *Lewis Desormeaux*, he then being a servant to the said *John Lewis Desormeaux*; and it cannot be inferred from the mere circumstance of his being a servant to the owner, that he therefore had *authority* over these goods; and this being omitted in the indictment cannot be supplied by the evidence, that he had, during his father's absence, the controul and management of this department of the business.

SECONDLY, That the instrument in question is not *an order* but *a bare request.*

THIRDLY.—The order, to be within the meaning of this statute, must appear, and purport upon the face of it, to be in some degree compulsory on the person who is in the possession of the goods. But in the present case the order is not *directed* or addressed to any person, and therefore it does not appear to be an order on the person holding, or in actual possession of the goods.

THE learned JUDGE, conceiving this to be a *new case*, said, that he should reserve it for the consideration of the JUDGES, if the Jury should find the prisoner guilty; and therefore that it was not necessary for him to give any opinion then upon the subject.

THE Jury found the prisoner *Guilty*; and the case was accordingly reserved.

MR. BARON PERRYN, in the June Sessions following, after stating the form of the indictment, and the evidence, said:—The JUDGES have taken this case into consideration, and have had more than one conference upon it. The result of their consideration is, FIRST, That on the construction of the sta-

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tute 7 Geo. II. c. 22. the forged warrant or order for the delivery of goods must purport to be the order of the owner of the goods, or of some person who has, or at least claims an interest in, or who has or at least assumes a disposing power over such goods, and takes upon him to transfer the property or custody of them to the person in whose favour such order is made. This rule of construction is supported by a variety of uniform and concurrent determinations; but particularly by the cases of *Mary Mitchell* (1), *The King* v. *Williams* (2), and *Jones's Case* (3). As the order therefore must be such an order as, if true, the party had, or assumed to have an authority or power to make (4), so it must be directed to the holder of, or to the person interested in, or having possession of, the goods which are the subject-matter of the order. Now, in the present case, the order set forth in the indictment is not directed to any person whatever, but merely expresses a desire that eight pounds weight of silk should be delivered to the bearer of it, without any direction from whom it was to be received. On this ground therefore the Judges are of opinion, that this is not a warrant or order within the meaning of the Act of Parliament.—SECONDLY, On the objection to the form of the indictment. As the name of the person subscribed to the order must be the name of a person who had an authority to make such order if it had been true, it ought to appear in the indictment, that the person whose name is subscribed had such authority: but, in the present case it cannot even be collected from the words of the indictment, by any legal inference; for *Lewis Desormeaux*, the person whose name is forged, is stated to be the servant of the owner, which excludes every idea that he had or could claim any interest in the goods which were the subject of the order. The indictment ought expressly to have averred, that he had authority to make such order. The Judges therefore on these grounds are of opinion, that the judgment must be arrested, and consequently the prisoner be discharged.

(1) Foster, 119.
(2) *Ante*, page 114. Case 69.
(3) *Ante*, page 53. Case 29.
(4) See Rex v. Ward, 1 Ld. Ray. 146. 2 Stra. 747.

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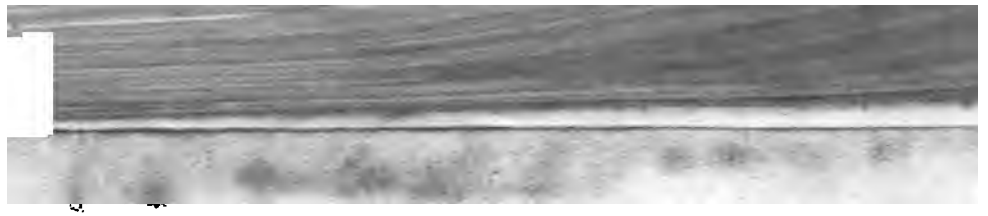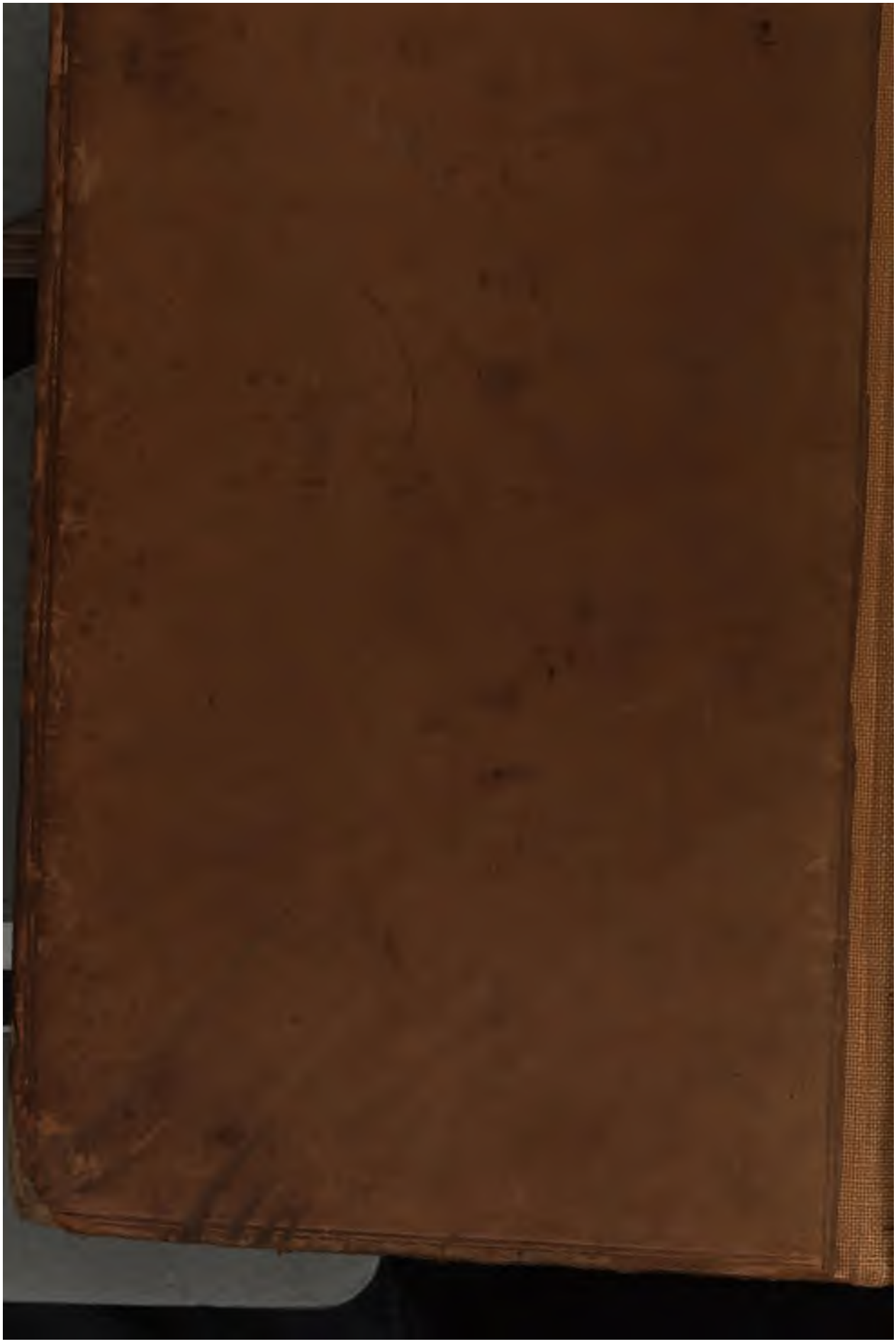
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